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EXHIBIT #1

MEMORANDUM OPINION DENYING RELIEF

ARIZONA COURT OF APPEALS

1CA-CR16-0377

DECIDED JUNE 29, 2017

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

RANDY S. DIEHL, *Appellant.*

No. 1 CA-CR 16-0377
FILED 6-29-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-001922-001
The Honorable Colleen L. French, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza Ybarra
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry Reid
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Randy Diehl appeals his conviction and sentence for sale or transportation of dangerous drugs. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 At approximately 3:30 p.m. on December 3, 2013, undercover detectives S.A. and R.E. drove to a neighborhood they had been investigating to conduct a drug buy. After R.E. parked their unmarked vehicle, S.A. approached a man on the street and "struck up a conversation." Before long, the man inquired why S.A. was there, and S.A. explained that he was interested in purchasing "a teener of jale," which is street terminology for a sixteenth ounce of methamphetamine.

¶3 At that point, the man introduced himself as "Randy," stated he could provide the desired methamphetamine, and invited S.A. inside a nearby apartment. Once inside, S.A. and Randy negotiated a price and S.A. tendered the agreed amount. Randy briefly walked into a back room, and then returned and handed S.A. the methamphetamine.

¶4 After completing the buy, S.A. exited the apartment building and rejoined R.E. in the unmarked vehicle. As the detectives began talking, they saw a man walk directly past the driver's side window and S.A. identified the man as "Randy," the individual who had sold him the methamphetamine.

¶5 When the detectives returned to the police station a few hours later, R.E. searched the police database for the methamphetamine dealer. Having heard from neighborhood contacts that a man named Randy Diehl was a possible drug dealer, R.E. entered the name into the database and retrieved a picture of an individual he "immediately" recognized as the man S.A. had identified. R.E. printed two copies of the photograph. He signed and dated one, evidencing his positive identification, and presented the other to S.A., asking whether he recognized the pictured individual.

S.A. also "immediately" recognized the pictured individual as the man who had sold him methamphetamine, and signed and dated the photograph.

¶6 The state charged Diehl with one count of sale or transportation of dangerous drugs. The state also alleged aggravating circumstances and that Diehl had multiple prior felony convictions.

¶7 At trial, the state introduced as exhibits the signed and dated photographs of Diehl, and both detectives positively identified Diehl in-court as the methamphetamine dealer. The state also presented evidence that the substance S.A. purchased from Diehl was 1.67 grams of usable methamphetamine.

¶8 After a three-day trial, the jury found Diehl guilty as charged and found one aggravating circumstance—that he committed the offense for pecuniary gain. The trial court then found that Diehl had two historical prior felony convictions and sentenced him to a mitigated term of ten and one-half years' imprisonment. Diehl timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

¶9 On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2, 340 P.3d 1110, 1112 n. 2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495, 924 P.2d 497, 499 (App. 1996)).

I. Admission of Identification Evidence

¶10 Diehl contends the trial court improperly denied his motion to suppress the detectives' pre-trial identifications and preclude the detectives' in-court identifications. He asserts the admission of the identification evidence violated his due process rights.

¶11 "We review the fairness and reliability of a challenged identification for a clear abuse of discretion." *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002). Although we defer to the trial court's factual findings that are supported by the record, we consider de novo the "ultimate question of the constitutionality of a pretrial identification," which is a mixed question of law and fact. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009) (citations omitted). In reviewing the trial court's

ruling, we consider only the evidence presented at the suppression hearing. *Id.*

¶12 Before trial, Diehl moved to suppress any identification testimony. At a two-day evidentiary hearing held on the motion, S.A. testified that the primary objective of his undercover investigations is to identify and charge drug dealers. Accordingly, he is particularly attentive to facial details during drug buys.

¶13 Because S.A. approached the methamphetamine dealer on the street in "daylight," he had the opportunity to clearly view the man in direct sunlight while speaking with him face-to-face for several minutes. S.A. noted that the man was in his late 30's to early 40's, Caucasian, clean-shaven with a "conservative" haircut, and approximated his height at six feet and two inches. Inside the "fairly well lit" apartment, S.A. had another unobstructed opportunity to view the dealer up close. Finally, after the drug buy, S.A. "got another good look" at the dealer as he walked directly past the unmarked vehicle.

¶14 When asked about his subsequent identification of Diehl as the methamphetamine dealer, S.A. acknowledged that R.E. only showed him a single photograph and admitted that he did not take any notes immediately after the drug buy and therefore relied only on his memory to make the identification. Nonetheless, he was "positive" that the pictured individual, Diehl, was the man who had sold him methamphetamine. He also explicitly denied that his identification of Diehl was in any way influenced by R.E. Likewise, R.E. testified that he immediately recognized Diehl when he conducted the database search, and stated he was "100 percent" certain of his identification.

¶15 After receiving the evidence and hearing argument from the parties, the court found the "out-of-court identification process was unduly suggestive." The court further found, however, that the detectives' identifications were "sufficiently reliable to be introduced without violating [Diehl's] due process rights." Specifically, the court found the detectives: (1) had sufficient opportunity to view the dealer, (2) established their penchant for detail, (3) demonstrated a high level of certainty in their identifications, and (4) made their identifications within a "relatively short" time frame.

¶16 A "criminal defendant's due process rights include the right to a fair identification procedure." *State v. Leyvas*, 221 Ariz. 181, 185, ¶ 10, 211 P.3d 1165, 1169 (App. 2009). "It is the likelihood of misidentification

which violates a defendant's right to due process." *Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)). Nonetheless, an "overly suggestive" pretrial identification procedure does not necessarily "bar the admission of an identification." *Id.* "Instead, the question is whether the identification is reliable in spite of any suggestiveness." *Id.* To evaluate reliability, the court considers several factors: (1) the opportunity of the witness to view the criminal at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty the witness demonstrates "at the confrontation;" and (5) the "time between the crime and the confrontation." *Id.* at 521, ¶ 48, 38 P.3d at 1184. In considering the relevant factors, a court must determine whether the totality of the circumstances demonstrate that the identification is reliable. *State v. Swoopes*, 155 Ariz. 432, 434, 747 P.2d 593, 595 (App. 1987).

¶17 Applying these factors here, S.A. had the opportunity to squarely view the methamphetamine dealer for several minutes. Although R.E. did not have the same degree of close contact with the dealer, he had the opportunity to view the dealer before S.A. accompanied him into the apartment and as he walked directly past the unmarked vehicle's window. Each of the detectives had at least twenty-five years of experience in law enforcement, and S.A. testified that the purpose of the undercover investigation was to identify drug dealers and bring charges against them, so the men paid careful attention to facial details. The detectives testified that they were certain that the pictured individual was the methamphetamine dealer, and they made their identifications within four and one-half hours of the drug deal. Although neither detective provided a written description of the suspect before viewing the photograph, the factors overall reflect that their identifications were reliable.

¶18 Because the detectives' out-of-court identifications were reliable, their in-court identifications were admissible. *See Lehr*, 201 Ariz. at 521, ¶ 52, 38 P.3d at 1184 (noting an in-court identification "may be tainted by suggestive lineup procedures," but explaining when a "pretrial identification comports with due process" a "subsequent identification at trial does not violate a defendant's rights merely by following on the heels of the earlier confrontation"). Therefore, the trial court did not abuse its

discretion by denying Diehl's motion to suppress or admitting the detectives' in-court identifications at trial.[1]

II. Response to Jury Deliberation Question

¶19 Diehl contends the trial court committed structural error by responding to a jury deliberation question without notifying the parties. In the alternative, he argues the court improperly responded to the question, thereby violating his due process rights.

¶20 Shortly after noon on April 13, 2016, the jurors retired to consider their verdict. Excluding their lunch period, the jurors deliberated for approximately two hours before returning a guilty verdict. While deliberating, the jurors submitted a question to the court, "Is positive photo identification enough to rule out reasonable doubt?" The trial court responded in writing, "That is an issue for the jury to decide." At a subsequent hearing conducted by the trial court to settle the record, the parties agreed that the court did not notify them of the jurors' question.

¶21 "The general rule in Arizona is that reversible error occurs when a trial judge communicates with jurors after they have retired to deliberate unless the defendant and counsel have been notified and given an opportunity to be present." *State v. Dann*, 220 Ariz. 351, 368, ¶ 86, 207

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[1] Diehl correctly notes that a court may consider other relevant factors when evaluating the reliability of an identification, *see State v. Rojo-Valenzuela*, 235 Ariz. 617, 620, ¶ 10, 334 P.3d 1276, 1279 (App. 2014), and argues the detectives' (1) inability to remember various details regarding the drug buy, and (2) participation in subsequent drug buys on the day in question undermine the reliability of their identifications. Given the overall strength of the other factors, we cannot say the detectives' failure to remember minor details of the drug buy (i.e., whether the dealer had the drugs in his pocket, whether S.A. left the money on the table or handed it directly to the dealer, who had told R.E. that a man named Randy Diehl may be a drug dealer, and the address of the apartment) rendered their identifications unreliable. Likewise, on this record, there is no basis to conclude that the detectives' participation in two subsequent drug buys the same afternoon undermined the accuracy of their identifications. *See State v. Rojo-Valenzuela*, 237 Ariz. 448, 451, ¶¶ 10-11, 352 P.3d 917, 920 (2015) (explaining that once the trial court determines the identification is sufficiently reliable to meet the threshold for admissibility, the jury assesses "the weight and credibility of testimony and resolving any evidentiary conflicts" in undertaking its role as fact-finder).

P.3d 604, 621 (2009). "Erroneous jury communications do not require reversal, however, if it can be said beyond a reasonable doubt that the defendant was not prejudiced by the communication." *Id.*

¶22 Here, the trial court erred by communicating with the jurors without notifying counsel. But the error does not warrant reversal because the communication conveyed accurate information that was consistent with the instructions given to the jurors, and the error did not harm Diehl.

¶23 In its final instructions, the trial court admonished the jury regarding identification as follows:

> The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:
>
> 1. the witness' opportunity to view at the time of the crime;
> 2. the witness' degree of attention at the time of the crime;
> 3. the accuracy of any descriptions the witness made prior to the pretrial identification;
> 4. the witness' level of certainty at the time of the pretrial identification;
> 5. the time between the crime and the pretrial identification;
> 6. any other factor that affects the reliability of the identification.
>
> If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.

More generally, the court also instructed the jurors that: (1) it was their duty to determine the facts and assess the credibility of witnesses, (2) law enforcement officers were not entitled to any greater importance or believability than other witnesses, (3) Diehl was presumed innocent, and (4) the state had the burden of proving each element of the charge beyond a reasonable doubt and the jurors should only convict if "firmly convinced" of Diehl's guilt.

¶24 Viewed within the context of these other instructions, the trial court's written statement affirming that only the jurors could determine

whether the state had met its burden of proof was both "legally correct and appropriate." *Id.* at ¶ 87, 207 P.3d at 621 (citation omitted); *see also State v. Sammons*, 156 Ariz. 51, 57, 749 P.2d 1372, 1378 (1988) (concluding trial court's ex parte communication that the jurors had "received all the instructions relevant to th[e] case" was harmless, specifically noting that "the judge's response was in writing and added nothing to the settled instructions which had been given"). Therefore, although the trial court erred by responding to the jury's question without notifying the parties, its response, which "did not impart any erroneous information to the jury," caused no prejudice. *State v. Shumway*, 137 Ariz. 585, 587, 672 P.2d 929, 931 (1983).

CONCLUSION

¶25 We affirm Diehl's conviction and sentence.

AMY M. WOOD • Clerk of the Court
FILED: AA

EXHIBIT # 2

LETTER DENIAL OF PETITION FOR REVIEW

ARIZONA SUPREME COURT

CR-17-0328-PR

DECIDED NOVEMBER 17, 2017

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

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

TELEPHONE: (602) 452-3396

November 17, 2017

RE: STATE OF ARIZONA v RANDY S DIEHL
Arizona Supreme Court No. CR-17-0328-PR
Court of Appeals, Division One No. 1 CA-CR 16-0377
Maricopa County Superior Court No. CR2015-001922-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 17, 2017, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Eliza Ybarra
Terry Reid
Randy S Diehl, ADOC 245140, Arizona State Prison, Florence - Eyman Complex-Meadows Unit
Amy M Wood

tel

EXHIBIT # 3

MAGISTRATE'S REPORT & RECOMMENDATION

U.S. DISTRICT COURT of ARIZONA

CV19-1568-PHX-DLR

FILED April 26, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Randy Scott Diehl,
Petitioner
-vs-
Charles L. Ryan, et al.,
Respondents.

CV-19-1568-PHX-DLR (JFM)

Report & Recommendation on Petition for Writ of Habeas Corpus

I. MATTER UNDER CONSIDERATION

Petitioner has filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 8). The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

In disposing of Petitioner's direct appeal, the Arizona Court of Appeals described the factual background as follows:

> ¶2 At approximately 3:30 p.m. on December 3, 2013, undercover detectives S.A. and R.E. drove to a neighborhood they had been investigating to conduct a drug buy. After R.E. parked their unmarked vehicle, S.A. approached a man on the street and "struck up a conversation." Before long, the man inquired why S.A. was there, and S.A. explained that he was interested in purchasing "a teener of jale," which is street terminology for a sixteenth ounce of methamphetamine.
>
> ¶3 At that point, the man introduced himself as "Randy," stated he could provide the desired methamphetamine, and invited S.A. inside a nearby apartment. Once inside, S.A. and Randy negotiated a

> price and S.A. tendered the agreed amount. Randy briefly walked into a back room, and then returned and handed S.A. the methamphetamine.
>
> ¶4 After completing the buy, S.A. exited the apartment building and rejoined R.E. in the unmarked vehicle. As the detectives began talking, they saw a man walk directly past the driver's side window and S.A. identified the man as "Randy," the individual who had sold him the methamphetamine.
>
> ¶5 When the detectives returned to the police station a few hours later, R.E. searched the police database for the methamphetamine dealer. Having heard from neighborhood contacts that a man named Randy Diehl was a possible drug dealer, R.E. entered the name into the database and retrieved a picture of an individual he "immediately" recognized as the man S.A. had identified. R.E. printed two copies of the photograph. He signed and dated one, evidencing his positive identification, and presented the other to S.A., asking whether he recognized the pictured individual. S.A. also "immediately" recognized the pictured individual as the man who had sold him methamphetamine, and signed and dated the photograph.

(Exh. JJ, Mem. Dec. 6/29/17 at ¶¶ 2-5.) (Exhibits to the Answer, Doc. 25, are referenced herein as "Exh. ___." Exhibits to the Amended Petition, Doc. 8, are referenced herein as "Pet. Exh. __.")

B. PROCEEDINGS AT TRIAL

Petitioner was eventually charged with one count of sale or transportation of dangerous drugs, with aggravating factors and multiple prior felony convictions. (Exh. A, Indict.) Petitioner proceeded to a jury trial and was convicted as charged with one aggravating circumstance (pecuniary gain), and was sentenced on May 13, 2016 to a mitigated term of 10.5 years. (Exh. JJ, Mem. Dec. 6/29/17 at ¶¶ 7-8.)

C. PROCEEDINGS ON DIRECT APPEAL

Petitioner filed a direct appeal raising claims based on: (1) the suggestive nature of the photo identification and the resulting effect on an in-court identification; and (2) denial of counsel during consideration of a jury question during deliberation. (Exh. GG.) The Arizona Court of Appeals rejected the claims and affirmed Petitioner's conviction and sentence. (Exh. JJ, Mem. Dec. 6/29/17.)

Petitioner sought review by the Arizona Supreme Court (Exh. KK), which was

summarily denied (Exh. MM, Order 11/17/17.)

D. PROCEEDINGS ON POST-CONVICTION RELIEF

Petitioner commenced a post-conviction relief (PCR) proceeding on December 21, 2017 by filing *pro se* a Notice of PCR (Exh. NN), Request for Record (Exh. PP), and PCR Petition and attached Supplemental Brief (Exh. OO).[1] The PCR court construed the Notice and Petition as a single PCR Notice, appointed counsel, and set a briefing schedule. (Exh. QQ, M.E. 2/21/18.) Eventually, at Petitioner's request, counsel was permitted to withdraw, but directed to remain in an advisory capacity. The original PCR Petition (Exh. OO) was reinstated and the state was ordered to respond. (Exh. RR, M.E. 4/13/18.) The PCR court concluded that the substantive claims related to the motion to suppress and prosecutorial misconduct were precluded, and his claims of ineffective assistance of counsel and actual innocence were not colorable. Accordingly, the PCR Petition was summarily dismissed. (Exh. ZZ, Order 8/7/18.)

Petitioner then filed a Petition for Review (Exh. CCC), again raising various substantive claims (fabricated evidence, perjury, error in denial of suppression of the pretrial identification, actual innocence) and claims of ineffective assistance of counsel on various grounds (defective indictment, failure to investigate *Brady* materials, and exculpatory evidence, failure to object to delinquent disclosures of photographs, failure to present evidence of perjury on the pretrial identification, failure to challenge the chain of custody on, authentication and disclosure of the photographs). The Arizona Court of Appeals granted review but summarily denied relief, finding no abuse of discretion by the PCR court in denying the PCR petition. (Exh. FFF, Mem. Dec. 1/22/19.)

E. PRESENT FEDERAL HABEAS PROCEEDINGS

Petition - Petitioner, presently incarcerated in the Arizona State Prison Complex at

[1] On July 8, 2016, during the pendency of his direct appeal, Petitioner filed a request for preparation of the PCR record (Exh. EE), which the PCR court denied as premature (Exh. FF, Order 7/13/16).

Florence, Arizona, commenced the current case by filing his original Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on March 7, 2019 (Doc. 1). Petitioner subsequently filed an Amended Petition (Doc. 8) (hereinafter "Petition"). On screening the Court concluded the Petition asserts the following six primary grounds for relief:

> In Ground One, Petitioner alleges that his attorney provided ineffective assistance. In Ground Two, Petitioner alleges that the State "employ[ed] an unduly suggestive and unreliable pretrial photographic identification procedure," which later "taint[ed] the in-court identification" of Petitioner. In Ground Three, Petitioner alleges that detectives "fabricated evidence of [] identification." In Ground Four, Petitioner alleges that his due process rights were violated when his attorney failed to object to the admission of certain photos or challenge the "flawed indictment," the prosecution "manipulated/tampered with the photo evidence," and the indictment was "invalid as a charging document." In Ground Five, Petitioner alleges that the prosecution withheld exculpatory evidence, and that his attorney was ineffective for failing to force the prosecution to turn over the evidence. In Ground Six, Petitioner alleges that he is actually innocent.

(Order 5/7/19, Doc. 12 at 2.)

Response –Respondents Limited Answer (Doc. 25) (hereinafter "Answer") argues that Ground portions of Ground 4, and all of Ground 6 are not cognizable, Grounds 3, and portions of Grounds 4 and 5 are procedurally defaulted, and Grounds 1 and 2, and portions of Grounds 4 and 5 are without merit under the deferential review required by the AEDPA.

Reply –Petitioner filed an original Reply (Doc. 31). The Court granted (Order 11/7/19, Doc. 42) Petitioner leave to file an Amended Reply, which was filed on November 7, 2019 (Doc. 43).

Deletion of Claims – On November 25, 2019 Petitioner filed a Motion to Waive Claims (Doc. 39). That motion was granted on January 7, 2020, deeming the Petition amended to delete from the Petition the claims in Grounds 3, 4, 5, and 6, leaving only Grounds 1 and 2. (Order 1/7/20, Doc. 47.) Respondents were given an opportunity to amend their answer in light of the amendments but declined to do so. (Notice Adopting Answer, Doc. 51.)

Supplementation of Record – Petitioner filed three Motions to Include Transcripts (Docs. 29, 32, 33). In the absence of an objection, they were granted, and the attached

records made a part of the record in the case. (Order 11/4/19, Doc. 40.)

In light of the foregoing, this matter is to be resolved as to Grounds 1 and 2 on the basis of the Amended Petition (Doc. 8), the Answer (Doc. 25), the Amended Reply (Doc. 43), the exhibits to the foregoing, and the additional exhibits (Docs. 29, 32, 33).

III. APPLICATION OF LAW TO FACTS

A. REQUEST FOR EVIDENTIARY HEARING

In his Amended Reply, Petitioner summarily references "Evidentiary Hearing Requested." (Reply, Doc. 43 at 1.) No evidentiary hearing should be granted for the following reasons.

First, the remaining claims were addressed by the state courts on the merits. Under § 2254(d), a habeas court's review of an issue decided on the merits "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Second, even when a claim is reviewed *de novo*, the petitioner may not obtain an evidentiary hearing or otherwise introduce new evidence if he has "failed to develop" the record in the state courts, unless he meets certain stringent showings related to justification for the delay in developing the record, 28 U.S.C. § 2254(e)(2)(A), and that the new evidence will show a lack of evidence to convict, 28 U.S.C. § 2254(e)(2)(B). Petitioner proffers no justification for his failure to develop the record on his claims to include whatever new evidence might be introduced at an evidentiary hearing.

Third, 28 U.S.C. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner has the burden of proof to rebut the presumption by "clear and convincing evidence." Petitioner proffers nothing to suggest that any new evidence would be "clear and convincing."

Fourth, even where permitted an evidentiary hearing the petitioner "must meet one of the *Townsend* [*v. Sain*, 372 U.S. 293 (1963)] factors and make colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief." *Insyxiengmay*

v. Morgan, 403 F.3d 657, 670 (9th Cir. 2004). Thus, where a petitioner does not proffer any evidence to be adduced at an evidentiary hearing which would prove the allegations of the petition, the habeas court need not grant a hearing. *Chandler v. McDonough*, 471 F.3d 1360, 1363 (11th Cir. 2006) ("The failure to proffer any additional evidence defeats [petitioner's] argument that he was entitled to an additional evidentiary hearing in federal court."); *Williams v. Bagley,* 380 F.3d 932, 977 (6th Cir.2004) ("district court did not abuse its discretion in denying Williams's request, given his failure to specify ... what could be discovered through an evidentiary hearing"); *Lincecum v. Collins,* 958 F.2d 1271, 1279–80 (5th Cir.1992) (denying evidentiary hearing "[a]bsent any concrete indication of the substance of the mitigating evidence" the hearing supposedly would provide). Here, Petitioner fails to offer what new evidence would be adduced or its relevance to the remaining factual issues in this case.

B. HABEAS STANDARD OF REVIEW

Standard of Review

While the purpose of a federal habeas proceeding is to search for violations of federal law, in the context of a prisoner "in custody pursuant to the judgment a State court," 28 U.S.C. § 2254(d) and (e), not every error justifies relief.

Deferential Review of Merits Decisions – Where the state court has rejected a claim on the merits, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Woodford v. Visciotti*, 537 U. S. 19, 24– 25 (2002) (per curiam). *See Johnson v. Williams*, 133 S.Ct. 1088, 1091-92 (2013) (adopting a rebuttable presumption that a federal claim rejected by a state court without being expressly addressed was adjudicated on the merits).

Rather, in such cases, 28 U.S.C. § 2254(d) provides restrictions on the habeas court's ability to grant habeas relief based on legal or factual error. This statute "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal

justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011).

Errors of Law – To justify habeas relief based on legal error, a state court's merits-based decision must be "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" before relief may be granted. 28 U.S.C. §2254(d)(1).

The Supreme Court has instructed that a state court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotation marks omitted).

To show an unreasonable application, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Errors of Fact – Similarly, the habeas courts may grant habeas relief based on factual error only if a state-court merits 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)(2). "Or, to put it conversely, a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014). "Moreover, implicit findings of fact are entitled to deference under § 2254(d) to the same extent as explicit findings of fact." *Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008). *See also Watkins v. Rubenstein*, 802 F.3d 637, 649 (4th Cir. 2015).

Applicable Decisions – In evaluating state court decisions, the federal habeas court

looks through summary opinions to the last reasoned decision. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Here, the last reasoned decisions on Petitioner's claims in Grounds 1 and 2 were in the Arizona Court of Appeals on direct appeal, the Arizona Supreme Court having issued a summary opinion (*see* Exh. MM, Order 11/17/17).

C. MERITS OF GROUND 1 – EX PARTE RE JURY QUESTION

1. Background

In Ground 1, Petitioner argues that he was denied counsel and his right to be heard at a critical phase of the trial when, during jury deliberations, the jury and the trial judge communicated with each other without notification to Petitioner's counsel.[2] Petitioner raised this claim on direct appeal. The Arizona Court of Appeals found:

> ¶20 Shortly after noon on April 13, 2016, the jurors retired to consider their verdict. Excluding their lunch period, the jurors deliberated for approximately two hours before returning a guilty verdict. While deliberating, the jurors submitted a question to the court, "Is positive photo identification enough to rule out reasonable doubt?" The trial court responded in writing, "That is an issue for the jury to decide." At a subsequent hearing conducted by the trial court to settle the record, the parties agreed that the court did not notify them of the jurors' question.
>
> * * *
>
> ¶23 In its final instructions, the trial court admonished the jury regarding identification as follows:
>
> > The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:
> >
> > 1. the witness' opportunity to view at the time of the crime;
> >
> > 2. the witness' degree of attention at the time of the crime;
> >
> > 3. the accuracy of any descriptions the witness made prior to the pretrial identification;
> >
> > 4. the witness' level of certainty at the time of the pretrial identification;
> >
> > 5. the time between the crime and the pretrial identification;

[2] The Court's Service Order (Doc. 12), without the benefit of the record, construed this as a claim of ineffective assistance of counsel. Both Respondent and Petitioner argue the claim as one of a denial of counsel.

> 6. any other factor that affects the reliability of the identification.
>
> If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.
>
> More generally, the court also instructed the jurors that: (1) it was their duty to determine the facts and assess the credibility of witnesses, (2) law enforcement officers were not entitled to any greater importance or believability than other witnesses, (3) Diehl was presumed innocent, and (4) the state had the burden of proving each element of the charge beyond a reasonable doubt and the jurors should only convict if "firmly convinced" of Diehl' s guilt.

(Exh. JJ, Mem. Dec. 6/29/17 at ¶ 20.) The court rejected the claim, reasoning:

> ¶21 "The general rule in Arizona is that reversible error occurs when a trial judge communicates with jurors after they have retired to deliberate unless the defendant and counsel have been notified and given an opportunity to be present." *State v. Dann*, 220 Ariz. 351, 368, ¶ 86, 207 P.3d 604, 621 (2009). "Erroneous jury communications do not require reversal, however, if it can be said beyond a reasonable doubt that the defendant was not prejudiced by the communication." *Id.*
>
> ¶22 Here, the trial court erred by communicating with the jurors without notifying counsel. But the error does not warrant reversal because the communication conveyed accurate information that was consistent with the instructions given to the jurors, and the error did not harm Diehl."
>
> * * * *
>
> ¶24 Viewed within the context of these other instructions, the trial court's written statement affirming that only the jurors could determine whether the state had met its burden of proof was both "legally correct and appropriate." *Id.* at 187,207 P.3d at 621 (citation omitted); *see also State v. Sammons*, 156 Ariz. 51, 57, 749 P.2d 1372, 1378 (1988) (concluding trial court's ex parte communication that the jurors had "received all the instructions relevant to th[e] case" was harmless, specifically noting that "the judge's response was in writing and added nothing to the settled instructions which had been given"). Therefore, although the trial court erred by responding to the jury's question without notifying the parties, its response, which "did not impart any erroneous information to the jury," caused no prejudice. *State v. Shumway*, 137 Ariz. 585, 587, 672 P.2d 929, 931 (1983).

(*Id.* at ¶¶ 21-24.)

Petitioner argues this decision was contrary to U.S. Supreme Court law which provides that a denial of the right to counsel and the right to be heard are structural errors not subject to harmless error review, and the error was not harmless. He argues that

responding to the jury's request for instructions was a "critical" stage of the case. Petitioner further argues the state court failed to address the merits of his *federal* claims because it relied on only state court precedent. (Petition, Doc. 8, Memo in Supp. at 7-20.)

Respondents argue the Supreme Court has never held such events to be a critical stage, and the Ninth Circuit has held that it is not structural error. Moreover, they argue it was harmless error. (Answer, Doc. 25 at 47-54.)

Petitioner replies by restating his arguments, citing to various circuit opinions, and asserting a rubric he believes the court should follow in resolving his claim. (Reply, Doc. 43 at 1-24.)

2. Decision on the Merits

AEDPA deference generally only applies where the state court has rejected the federal claim on its merits. Petitioner argues there was no merits decision on his claims in Ground 1 because the state court cited only state authorities. (Pet. Doc. 8, Mem. at 9.)

Indeed, at first blush it appears the state court resolved this claim by relying on state law pertaining to erroneous jury instructions, rather than a denial of the right to counsel or the right to be heard. To the contrary, a tracing back through the cases cited[3] and their authorities leads to *State v. Burnetts*, 80 Ariz. 208, 295 P.2d 377 (1956) which reasoned:

> In 53 Am.Jur., Trial, section 904, this fine statement appears:
>
> > '* * * After submission of the cause, the judge may not enter the jury room and there, in the absence of the parties and their counsel, communicate with the jurors or advise them of their duties; * * * **A violation of this rule in a criminal case has been held to deprive the accused of a constitutional right**, and in any case is regarded as ground for a new trial or as constituting reversible error, irrespective, according to many courts, of the question of actual prejudice resulting therefrom and provided, according to others, the misconduct is not harmless. If the necessity for a conference between the court

[3] *See State v. Dann*, 220 Ariz. 351, 368, ¶ 86, 207 P.3d 604, 621 (2009) (citing *State v. Mata*, 125 Ariz. 233, 240–41, 609 P.2d 48, 55–56 (1980)); *Mata, supra* (citing *State v. Lamb*, 116 Ariz. 134, 568 P.2d 1032 (1977)); *Lamb, supra* (citing *State v. Burnetts*, 80 Ariz. 208, 295 P.2d 377 (1956)).

> and jury arises during deliberations, the jury should be brought into court.'

Id. at 211, 295 P.2d at 379 (emphasis added).

Moreover, even if this Court could find that the state court's discussion was limited to the related state law claim, that would not avoid a finding that the federal claims were not rejected on the merits. "[A]n adjudication on the merits is 'a decision finally resolving the parties' claims ... that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.'" *Kirkpatrick v. Chappell*, 950 F.3d 1118, 1131 (9th Cir. 2020) (quoting *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004)). "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted." *Johnson v. Williams*, 568 U.S. 289, 301 (2013).

Petitioner posits no reason that, assuming an absence of discussion of his federal claims, this Court should conclude that the rejection of his claims was on procedural grounds. The only argument presented to the state court in the Answering Brief was on the merits of the claim, as opposed to a procedural ground. (*See* Exh. HH at 25-32.)[4]

Accordingly, the undersigned concludes the state court resolved Petitioner's federal claims in Ground 1 "on the merits," and AEDPA deference in 28 U.S.C. § 2254(d) applies to that decision.

3. No Remediable Factual Error

Petitioner also argues that the appellate courts' conclusions must have been based on "pure conjecture" because during the hearing on limited remand, Petitioner was not present, there were no jury members present, and there was no "no discussion whatsoever between the parties and the trial court as to any of the circumstances surrounding the *ex*

[4] The undersigned observes that the filed copy of the Answering Brief (Exh. HH) end abruptly at page 32, after appearing to summarize the response to the claim ("In sum, the judge's ex parte communication, while improper, was substantively harmless beyond a reasonable doubt."). (Doc. 25-5 at 38.) Petitioner has not objected, and there appears no reason to believe that the omitted pages raised a procedural defense to the claim.

parte communication. (Amend. Reply, Doc. 43 at 9-10, 22-23.)

A factual determination can be unreasonable (within the meaning of § 2254(d)) if it is based on an unreasonable process for determining the facts. *Kipp v. Davis*, 971 F.3d 939, 953-954 (9th Cir. 2020). But Petitioner fails to show that the procedure was unreasonable. Petitioner does not suggest that he or the jury members had anything relevant to add to the testimony at the hearing. Nor does he show how the circumstances surrounding the *ex parte* communications could have altered the outcome.

At best, Petitioner speculates that the jury had concluded, until receiving the judge's response, that there was a reasonable doubt, and therefore the response had to be the *sine qua non* for the decision to convict. Petitioner's logic fails. At most, the jury's question suggested that at least some jurors were prepared to convict solely on the basis of the photo identification, but only if that was permissible. Thus, the Court's response (tantamount to an instruction that they could permissibly do so) may indeed have been instrumental in their decision to convict. But that does not make juror testimony to that effect relevant. Why? Because courts begin with the presumption that juries comply with their instructions. "We generally presume that jurors follow their instructions." *Penry v. Johnson*, 532 U.S. 782, 799 (2001). And here, there is no suggestion that the state court relied on a failure to follow the court's instructions in rejecting Petitioner's claims. Indeed, the state court relied instead on the fact that the judge's response was "both 'legally correct and appropriate.'" (Exh. JJ, Mem. Dec. 6/29/17 at ¶ 24.)

Petitioner otherwise posits no error of historical fact in the decision on this claim, as set out in paragraphs 20 and 22 of the decision. (Exh. JJ, Mem. Dec. 6/29/17 at ¶ 20, 22.) At most, he contends that the state court reached the wrong legal conclusions about those historical facts.

4. Right to Counsel

With regard to the right to counsel Petitioner argues two legal errors. First, he contends that the acknowledged error(s) in the judge communicating with the jury *ex parte*

were structural errors not subject to harmless error analysis. Second, he contends that, contrary to the conclusion of the state court, the error was not harmless.

a. Structural Error

Petitioner relies on *United States v. Cronic*, 466 US 648 (1984) which holds that automatic reversal is required where a defendant is denied counsel "at a critical stage." *See Wright v. Van Patten*, 552 U.S. 120, 125 (2008). *Cronic* provided only "a general standard applicable to claims regarding the denial of counsel at a 'critical stage" of the proceedings." *Musladin v. Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009). *Cronic* did not provide a definition of a "critical stage." Because judicial application of a general standard "can demand a substantial element of judgment," the more general the rule provided by the Supreme Court, the more latitude the state courts have in reaching reasonable outcomes in case-by-case determinations. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Here, the undersigned cannot find that the state court's decision was an unreasonable application of the Supreme Court law.

Moreover, not even the circuit court opinions clearly resolve whether this case involved a "critical stage" or the proceeding. In *U.S. v. Moshen,* 587 F.3d 1029 (9th Cir. 2009), the Ninth Circuit held that answering a jury question or request without first consulting defendant's counsel is not necessarily structural error always requiring reversal. In that case, the judge had simply communicated *ex parte* a refusal to provide the jury a copy of the indictment, which the parties had agreed would not be provided to the jury, which the circuit court found to be simple trial error. Conversely, in *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1110 (9th Cir. 2002), reviewing the matter *de novo* in a federal prosecution, the circuit court found "the delivery of a supplementary jury instruction constitutes a 'critical stage' of a trial for which the defendant's presence (or that of his counsel) is constitutionally required."[5] But that is not Supreme Court law, only the

[5] Petitioner cites to another Supreme Court decision, *Rogers v. U.S.*, 422 U.S. 35 (1975) for the proposition that any request for further instruction is a critical stage requiring participation of counsel. But *Rogers* decided only that a violation of Federal Rule of Criminal Procedure 43 had occurred when the judge responded to a question about

law of the Ninth Circuit.

Most enlightening is the state prisoner habeas case, *Musladin*, where counsel had been denied during a mid-deliberations communication between the judge and the jury, when the judge had responded to the jury's question by referring them back directly to the previously supplied instructions. The circuit court looked to *Bell v. Cone*, 535 U.S. 685, 696 (2002) to conclude that "critical stage" "denote[s] a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." The Ninth Circuit concluded that had counsel been allowed to participate in the process, he could have argued for a more effective instruction, and that reviewed *de novo* they would have found it a critical stage.

However, because *Musladin* was governed by the deferential standards under the AEDPA, the relevant question was whether the state court's contrary decision was an unreasonable application of *Cronic*. The court concluded it could not find the state court decision unreasonable:

> Although defense counsel plays a crucial role in formulating any mid-deliberation communication to the jury by the trial judge, where the judge simply directs the jury to his previous instructions, the potential impact of defense counsel's inability to participate is significantly lessened, because defense counsel played a role in the formulation of those instructions. In such circumstances, the jury receives only such information as was formulated with defense counsel's participation. Although we do not believe that defense counsel's prior participation is sufficient to render a mid-deliberation communication to the jury less "critical" for purposes of the *Cronic* analysis, we cannot say that it would be unreasonable for a state court to so conclude.

Musladin, 555 F.3d at 843. *See also United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) (finding Sixth Amendment right to counsel violated when judge decided not to respond to jury's question without hearing from counsel, but applying harmless error analysis).

Similarly, here, the Arizona court's refusal to find structural error would not be an

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recommendations for leniency. *Id.* at 39. Thus, *Rogers* did not address whether a "critical stage" was involved. At most, *Rogers* concluded that the error in that case was not harmless. *Id.* at 40.

unreasonable application of *Cronic*. Petitioner argues that his case is different because his trial judge did not explicitly refer back to the prior instructions, but instead responded that the question posed ("Is positive photo identification enough to rule out reasonable doubt?") was "an issue for the jury to decide."

While the response in Petitioner's case may have been differently worded, its import was the same, *i.e.* to refer the jury back to the existing instructions without providing additional instruction. Even if this Court could discern some functional distinction between "REFER TO THE INSTRUCTIONS," *Musladin*, 555 F.3d at 835, and "[t]hat is an issue for the jury to decide," Petitioner fails to explain how that distinction would be significant enough to make the Arizona court's decision an unreasonable application of *Cronic*.

Petitioner argues the response to the jury question amounted to an instruction that eliminated reasonable doubt. (Reply, Doc. 43 at 4.) But nothing in the response suggested the jury could convict on any standard other than reasonable doubt. Rather, it simply left it to the jury to decide if the photo identification was sufficient evidence to remove any reasonable doubt. But that was functionally no different than the general instruction given by the trial court on the jury's role in determining the existence of reasonable doubt.

Petitioner argues that the response somehow negated the instruction on reliability. (Amend. Reply, Doc. 43 at 4-5.) But neither the jury's question nor the judge's response were directed to the reliability of the photo, only sufficiency to eliminate reasonable doubt.

Petitioner points to *United States v. Martinez,* 850 F.3d 1097 (9th Cir. 2017) for the proposition that the "critical stage" determination must be made by looking only to the nature of jury question and the need for counsel's participation in formulating a response. But the *Martinez* court noted that in *Musladin,* "a state capital case on habeas review," they had to conclude that looking to the "formulation of the response...was not clearly established federal law." 850 F.3d at 1103–04. Indeed, the *Musladin* court had observed that "several circuits" had followed reasoning that "can be read as resting the Cronic assessment on the response rather than the question." *Musladin*, 555 F.3d at 842. The

Musladin court concluded to "disagree," and found "[t]he 'stage' at which the deprivation of counsel may be critical should be understood as the formulation of the response to a jury's request for additional instructions, rather than its delivery." *Id.* But the *Musladin* court recognized the because the question had not been answered by the Supreme Court, and other circuit courts disagreed, it could not find the state court had been "objectively unreasonable" in focusing on the response. *Id.*

Similarly, here, the state court focused on the response, and concluded harmless error applied because "the communication conveyed accurate information." (Exh. JJ, Mem. Dec. 6/29/17 at ¶ 20.) Accordingly, as in *Musladin*, this Court must conclude the state court's decision in Petitioner's case that harmless error applied was not an unreasonable application of *Cronic*. Accordingly, this Court must evaluate Petitioner's claim by determining whether the error was harmless.

b. Harmlessness

Petitioner contends that the Arizona Court of Appeals also erred in concluding that the error from the denial of counsel was harmless.

Because this matter is now being heard on habeas review, the standard of harmlessness applied is different from that applied by the state court.

> On direct appeal, a constitutional trial error can be held excused only if "it was harmless beyond a reasonable doubt." *Brecht v. Abrahamson*, 507 U.S. 619, 630 [ ] (1993). On habeas review, by contrast, we must apply the "less onerous standard" of whether the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637[ ]. "[T]he *Brecht* standard 'subsumes' the [§ 2254(d) requirements] when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless." *Davis v. Ayala*, [576 U.S. 257, 268 (2015)].

Bradford v. Davis, 923 F.3d 599, 619 (9th Cir. 2019).

> Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.' " There must be more than a "reasonable possibility" that the error was harmful.

Davis, 576 U.S. at 267–68 (citations omitted, quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).)

Petitioner argues that the state court should have looked to the possibility that counsel could have provided a better instruction that did not eradicate the "reliability" instruction. (Amend. Reply, Doc. 43 at 10.) But as discussed above, the instruction left unscathed the trial court's instruction on reliability.

Petitioner also argues that the judge's response replaced a "reasonable doubt" standard with a "preponderance standard." (Amend. Reply, Doc. 43 at 10.) But Petitioner fails to show how that was the case. The judge's response did not alter the burden of proof, it simply acknowledged that the jury had to decide if that burden had been met.

Moreover, Petitioner fails to suggest what other instruction counsel could have urged on the trial court that would have been more accurate than the response given by the trial court. Perhaps counsel would have preferred a complete recital of all jury instructions to highlight again the jury's obligation to determine reliability. But Petitioner proffers only conjecture to suggest that such instructions would have been fruitful. That conjecture does not leave the undersigned in grave doubt that the denial of counsel had a substantial and injurious effect on the jury's verdict.

Petitioner argues that the appellate court erred by relying on the instruction about the reliability of the *in-court* identification, when it was the out-of-court *photo* identification which was at issue in the jury's question. (Amend. Reply, Doc. 43 at 18.) Indeed, the jury's question was: "'Is positive *photo* identification enough to rule out reasonable doubt?' " (Exh. JJ, Mem. Dec. 6/29/17 at ¶ 20 (emphasis added).) In contrast, the jury instruction relied on by the state court was primarily related to the state's burden to prove "the *in-court* identification of the defendant at this trial is reliable." (*Id.* at ¶ 23 (emphasis added).)[6]

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[6] Subsumed in that instruction was direction that the jury consider various factors concerning the reliability of the "pretrial identification," *i.e.* the *photo* identification, including:

However, Petitioner explicitly argued to the Arizona Court of Appeals that "the question was material as it related directly to the only disputed fact in the case, whether the *in-court* identification of Appellant was reliable." (Exh. GG, Open. Brief at 34 (emphasis added).) To the extent that Petitioner now seeks to argue that the reliability of the *photo* identification was a material fact, he presents a fundamentally different claim than the one he raised in the state court proceedings. While new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Here, the undersigned does not harbor grave doubts about the effect on the jury's verdict of the exclusion of counsel from the handling of the jury question. Properly and fully instructed following their question, and despite the "suggestiveness" of the photo identification, the jury still was faced with a highly reliable photo identification. The Arizona Court of Appeals summarized the reliability of the photo identifications as follows:

> ¶ 17 Applying [the *Biggers*] factors here, S.A. had the opportunity to squarely view the methamphetamine dealer for several minutes. Although R.E. did not have the same degree of close contact with the dealer, he had the opportunity to view the dealer before S.A. accompanied him into the apartment and as he walked directly past the unmarked vehicle's window. Each of the detectives had at least twenty-five years of experience in law enforcement, and S.A. testified that the purpose of the undercover investigation was to identify drug dealers and bring charges against them, so the men paid careful attention to facial details. The detectives testified that they were certain that the pictured individual was the methamphetamine dealer, and they made their identifications within four and one-half hours of the drug deal. Although neither detective provided a written description of the suspect before viewing the photograph, the factors overall reflect that their identifications were reliable.

> 3. the accuracy of any descriptions the witness made prior to the pretrial identification;
> 4. the witness' level of certainty at the time of the pretrial identification;
> 5. the time between the crime and the pretrial identification;

(*Id.* at ¶ 23 (quoting the jury instruction).)

(Exh. JJ, Mem. Dec. 6/29/17 at ¶ 17.) *See Manson v. Brathwaite*, 432 U.S. 98 (1977) (single photo identification by an undercover agent found to be reliable where good opportunity to view seller during drug transaction, attention of trained police officer anticipating need to make later identification, accurate description, lack of pressure to make identification from photo, certainty of the identification, and short gap between drug sale and identification (2 days)). Moreover, a fully re-instructed jury would have remained entitled to convict based solely on that photo identification of Petitioner.

Accordingly, any error was harmless within the meaning of *Brecht*.

5. Right to be Present

Petitioner argues that the jury question response also denied his right to be present during a critical stage of the proceeding. (Amend. Petition, Doc. 8 at 6.) The Arizona Court of Appeals considered this claim together with the claim on denial of the right to counsel. (*See* Exh. JJ, Mem. Dec. 6/29/17 at ¶ 21 ("error occurs when a trial judge communicates with jurors...unless the defendant and counsel have been notified and given an opportunity to be present"), and ¶ 24 ("the trial court erred by responding to the jury's question without notifying the parties").

The Supreme Court has long recognized a right of civil and criminal litigants to be present during the giving of a supplementary instruction to the jury. *See Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) (civil case); and *Shields v. United States*, 273 U.S. 583, 588 (1927) (criminal case). Indeed, under the due process and confrontation clauses, a defendant has a constitutional right to be present at most stages of a trial. *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

> However, it is not a guaranteed right when presence would be useless, or the benefit but a shadow, or when the defendant could have done nothing had he been at the conference, nor would he have gained anything by attending. Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. The exclusion of a defendant from a trial proceeding should be considered in light of the whole record.

Clark v. Chappell, 936 F.3d 944, 990-991 (9th Cir. 2019) (citations and quotations

omitted).

Here, Petitioner proffers no reason to believe that his presence at the time the jury question was considered would have been productive. To the extent that Petitioner contends he could have pressed the same arguments as he asserts counsel could have, the undersigned has already concluded that any error was harmless under *Brecht.*

Accordingly, this claim is similarly without merit.

6. Conclusions

Although the trial court committed error in communicating with the jury without involving Petitioner and his counsel, the state appellate court could have reasonably concluded that the communication did not constitute a critical stage at which prejudice from the exclusion of counsel was presumed. And, the state appellate court reasonably concluded that any error from the exclusion of counsel and Petitioner was harmless. Therefore, Ground 1 is without merit and must be denied.

D. MERITS OF GROUND 2 – PHOTO IDENTIFICATION

In Ground 2, Petitioner argues that the admission of the photo identification was a denial of due process because it was made pursuant to an unduly suggestive procedure (*e.g.* a single photo provided by another officer, involvement with the perpetrator on a single occasion), and the prosecution could not show a prior description. He argues the photo identification tainted the in-court identification. (Amend. Petition, Doc. 8 at 7, Memo. at 14-28.)[7]

[7] As part of addressing exhaustion of state remedies on Ground 2, Petitioner argues that appellate counsel was ineffective in failing to present this claim to the Arizona Supreme Court on petition for review in his direct appeal proceedings. (Amend. Pet., Doc. 8, Memo. at 14-16.) Respondents concede that the substantive claim in Ground 2 was properly exhausted by presentation to the Arizona Court of Appeals, and thus do not further address the claim of ineffectiveness as cause to excuse a procedural default. (Answer, Doc. 25 at 35-36, n. 10.) Petitioner does not reply. Even if this Court were to construe this as a separate ground for relief, it would be without merit. Claims of ineffective assistance only lie where counsel is constitutionally required. "It is well-established that criminal defendants have no constitutional right to counsel beyond their first appeal as of right, and hence no right to counsel in a discretionary appeal to the State's

Respondents argue that Petitioner's argument relies upon the erroneous contention that each of the *Biggers* factors must be present to render an unduly suggestive identification reliable, and that the state court's failure to apply such a rule was not contrary to nor an unreasonable application of Supreme Court law. (Answer, Doc. 25 at 35-47.)

Petitioner replies that the direction in *Biggers* for each of the five factors " 'to be' considered" creates a requirement for each factor to be found, and that under this Supreme Court rule, his identification should have been suppressed because there was no prior description. (Amend. Reply, Doc. 43 at 25-26.)

The Arizona Court of Appeals rejected this claim on direct appeal, reasoning:

> ¶16 A "criminal defendant's due process rights include the right to a fair identification procedure." *State v. Leyvas*, 221 Ariz. 181, 185, ¶ 10, 1 P.3d 1165, 1169 (App. 2009). "It is the likelihood of misidentification which violates a defendant's right to due process." *Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)). Nonetheless, an "overly suggestive" pretrial identification procedure does not necessarily "bar the admission of an identification." *Id.* "Instead, the question is whether the identification is reliable in spite of any suggestiveness." *Id.* To evaluate reliability, the court considers several factors: (1) the opportunity of the witness to view the criminal at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty the witness demonstrates "at the confrontation;" and (5) the "time between the crime and the confrontation." *Id.* at 521, ¶ 48, 38 P.3d at 1184. In considering the relevant factors, a court must determine whether the totality of the circumstances demonstrate that the identification is reliable. *State v. Swoopes*, 155 Ariz. 432,434, 747 P.2d 593,595 (App. 1987).
>
> ¶ 17 Applying these factors here, S.A. had the opportunity to squarely view the methamphetamine dealer for several minutes. Although R.E. did not have the same degree of close contact with the dealer, he had the opportunity to view the dealer before S.A. accompanied him into the apartment and as he walked directly past the unmarked vehicle's window. Each of the detectives had at least twenty-five years of experience in law enforcement, and S.A. testified that the purpose of the undercover investigation was to identify drug dealers and bring charges against them, so the men paid careful attention to facial details. The detectives testified that they were certain that the pictured individual was the methamphetamine dealer, and they made their identifications within four and one-half hours of the drug deal. **Although neither detective provided a**

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highest court." *Smith v. Idaho*, 392 F.3d 350, 356–57 (9th Cir. 2004).

> **written description of the suspect before viewing the photograph, the factors overall reflect that their identifications were reliable.**
>
> ¶18 Because the detectives' out-of-court identifications were reliable, their in-court identifications were admissible. *See Lehr*, 201 Ariz. at 21, ¶ 52, 38 P.3d at 1184 (noting an in-court identification "may be tainted by suggestive lineup procedures," but explaining when a "pretrial identification comports with due process" a "subsequent identification at trial does not violate a defendant's rights merely by following on the heels of the earlier confrontation"). Therefore, the trial court did not abuse its discretion by denying Diehl' s motion to suppress or admitting the detectives' in-court identifications at trial.

(Exh. JJ, Mem. Dec. 6/29/17 at ¶¶ 16-18 (emphasis added).) This merits decision is entitled to deference under 28 U.S.C. § 2254(d).

The undersigned concludes that Petitioner misconstrues the nature of the *Biggers* factors. In *Biggers,* the Court described the analysis:

> We turn, then, to the central question, whether under the '***totality of the circumstances***' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors ***to be considered*** in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199–200 (emphasis added). The highlighted language does not mandate that each of the factors be *found* to weigh in favor reliability, only that they should be *considered*. Thus, each of the factors are not necessary to reliability (nor are they necessarily sufficient). Rather, the court must consider simply consider the factors and decide based on the "totality of the circumstances."

Even if this Court were convinced that the *Biggers* factors should be considered to constitute a checklist of factors required to be found, other reasonable jurists have disagreed. *See e.g. Mills v. Cason*, 572 F.3d 246, 251 (6th Cir. 2009) (finding in-court identification reliable despite inability of witness to provide description, and inability to make pretrial identification beyond narrowing to three of six photos).[8]

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[8] Petitioner appears to argue that because the § 2254(d) standard limits the habeas court to Supreme Court holdings, such a foreign circuit case is not properly considered. (Amend. Reply, Doc. 43 at 26.) Circuit court cases, whether the home circuit or a foreign circuit

Here, the Arizona court plainly considered each of the *Biggers* factors, including recognizing the absence of a prior description, *i.e.* "neither detective provided a written description of the suspect before viewing the photograph." (Exh. JJ, Mem. Dec. 6/29/17 at ¶ 17.) Thus, the state court "considered" the prior description factor.

To the extent that Petitioner would simply contend that the Arizona court weighed the factors and the totality of the circumstances incorrectly, Petitioner fails to show that the weighting was contrary to or an unreasonable application of Supreme Court law. Indeed, as discussed herein above in connection with Ground 1, some of the facts of this case are highly similar to those in *Manson* (single photo identification by an undercover agent, good opportunity to view seller during drug transaction, attention of trained police officer anticipating need to make later identification, lack of pressure to make identification from photo, certainty of the identification, and short gap between drug sale and identification), which the Court found to be a reliable identification. Even so, *Manson* is distinguishable. But the negative distinctions (the lack of a prior description, and the lack of corroborating physical evidence) are at least arguably offset by the positive ones (identification by single agent v. two agents; two-day gap vs. four-hour gap between crime and identification). *See Manson*, 432 U.S. 98.

Accordingly, the undersigned cannot find that the state court's decision was

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may not "be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013). But conflicting readings of Supreme Court decisions by the circuit courts can be evidence that a particular rule being espoused is not "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). They can show that "it is possible fairminded jurists could disagree that [the state court's] arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Of course such decisions do not dictate a finding of reasonableness.

> The mere existence of authority from other circuits does not render a state court's decision objectively reasonable for purposes of AEDPA. It is simply a factor that we may take into consideration. Like state courts, federal circuit courts may sometimes apply clearly established Supreme Court precedent in an objectively unreasonable manner.

Musladin v. Lamarque, 555 F.3d 830, 843, n. 11 (9th Cir. 2009).

contrary to or an unreasonable application of Supreme Court law. Therefore, Ground 2 is without merit.

IV. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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." *Id.* "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2253(c)(3). *See also* Rules Governing § 2254 Cases, Rule 11(a).

Standard Not Met - Assuming the recommendations herein are followed in the district court's judgment, that decision will be on the merits. Under the reasoning set forth herein, jurists of reason would not find the district court's assessment of the constitutional claims debatable or wrong. Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Petitioner's Amended Petition for Writ of Habeas Corpus, filed March 27, 2019 (Doc. 8) be **DENIED**.

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th

Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: April 23, 2021

19-1568r RR 21 04 09 on HC.docx

James F. Metcalf
United States Magistrate Judge

EXHIBIT # 4

ORDER DENYING A WRIT of HABEAS CORPUS

U.S. DISTRICT COURT of ARIZONA

CV 19-1568-PHX-DLR

DECIDED July 22, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Randy Scott Diehl,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-19-01568-PHX-DLR (JFM)

ORDER

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge James F. Metcalf (Doc. 54) regarding Petitioner's Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 8). The R&R concludes that Petitioner's claims are without merit and recommends that the Amended Petition be denied and dismissed with prejudice. The magistrate judge advised the parties that they had fourteen days from the date of service of the R&R to file specific written objections with the Court. Petitioner filed objections to the R&R on May 14, 2021 (Doc. 59) and Respondents filed their response on May 28, 2021 (Doc. 60). Moreover, Petitioner filed his "Alternate Petition to Grant Certificate of Appealability and to Certify Questions for Review by the Ninth Federal Circuit of Appeals" on April 30, 2021 (Doc 57) and his Motion for Partial Summary Judgment on July 6, 2021 (Doc. 62). The Court has considered the objections and reviewed the R&R *de novo*. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

Petitioner was charged with selling a sixteenth ounce of methamphetamine to an undercover police detective on December 3, 2013. After a jury trial, he was found guilty of the charge and convicted of one count of sale or transportation of dangerous drugs. Petitioner now raises eight objections to the R&R recommending denial and dismissal of his Amended Petition, which the Court will address, in turn.

Petitioner first objects to the "entirety" of the R&R. This first objection does not point to any specific grounds for the objection, and therefore provides the Court nothing to consider. Because the first objection does not meet the requirements of Fed. R. Civ. P. 72(b)(2), it is overruled.

Second, Petitioner objects that, during the deliberation phase of Petitioner's trial, the trial judge inappropriately communicated with the jury without consulting counsel. Particularly, the jury asked the trial court, "Is positive photo identification enough to rule out reasonable doubt?" The trial judge gave the *ex parte* answer, "That's an issue for the jury to decide." Petitioner argues that—because of the judge's *ex parte* statement—the jury convicted him based on a photo without finding, beyond a reasonable doubt, that he committed the other elements of the offense. The R&R correctly pointed out that courts begin with the presumption that juries comply with their instructions. (Doc. 54 at 12 quoting *Penry v. Johnson*, 532 U.S. 782, 799 (2001) ("We generally presume that jurors follow their instructions.")). Here, the jury instructions advised that Petitioner was presumed innocent, the state had the burden of proving each element of the offense beyond a reasonable doubt, and the jury should convict only if it was "firmly convinced" of Petitioner's guilt. Moreover, as the R&R found, the state appellate court resolved the issue on the merits, found that the judge's response to the jury question was both legally correct and appropriate, noted there was no reason to believe that the jury failed to follow the court's instructions, and concluded that, because Petitioner did not show that the communication was unreasonable or could have altered the outcome of the trial, the error was harmless. The second objection is overruled.

Petitioner's third objection relates to the R&R's rationale in finding that there was

sufficient evidence to support every element of the offense. Petitioner mainly complains that the R&R incorrectly distinguished this case from the facts in *Manson v. Brathwaite*, 432 U.S. 98 (1977) and argues that there was no evidence that corroborated "the allegation that Diehl had ever possessed, transported or sold any drugs, ever." (Doc. 59 at 3 (emphasis in original).) To the contrary, the R&R correctly analyzed the state of the evidence. Here, unlike in *Manson*, there were two detectives, rather than one, who observed Petitioner. They watched him in broad daylight, and one of the detectives, Ayala, who witnessed and testified to the sale, observed him for a lengthy period. Furthermore, the detectives here identified Petitioner within four hours of the event, rather than two days later like in *Manson*. Ultimately, the R&R correctly found that the differences between this case and *Manson* were distinctions that offset the lack of prior description and corroborating evidence. And, notably, there is no requirement that eyewitness testimony be corroborated. *See United States v. Zapata*, 205 F.3d 1327 (2d Cir. 2000) (quoting *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990)) ("[a]ny lack of corroboration goes merely to the weight of the evidence, not to its sufficiency."). Finally, Petitioner argues that the state did not meet its burden of production on each of the elements of the offense and reiterates that he was convicted only because of the trial judge's improper *ex parte* communication with the jurors. Petitioner's argument overlooks Detective Ayala's testimony—that he asked Petitioner for a specific amount of a specific drug (a sixteenth ounce of methamphetamine) and that Petitioner sold him that quantity of that drug for $60—which establishes all the elements of the offense. Petitioner's third objection is overruled.

Fourth, Petitioner objects to the R&R's statement that "each of the [*Biggers*] factors are not necessary to reliability." (Doc. 59 at 4.) In *Neil v. Biggers*, 409 U.S. 188 (1972), after summarizing prior holdings that unnecessary suggestiveness in identification procedures requires exclusion of evidence if it gives rise to a very substantial likelihood of irreparable misidentification, the Supreme Court listed the factors to be considered in evaluating the likelihood of misidentification (the *Biggers* factors)—the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the

accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation—and found that under the "totality of the circumstances," there, the identification procedures were reliable even though the confrontation procedure was suggestive. *Id.* at 199-200. The *Biggers* decision does not hold, as Petitioner suggests, that each factor is necessary for finding that the identification is reliable. Instead, the R&R correctly explained that *Biggers* provides a totality of circumstances test that considers a list of factors, rather than a mandate that each factor be found for an identification to be reliable. (Doc. 54 at 22.) Here, the Arizona Court of Appeals considered the *Biggers* factors, and Petitioner cannot show that the state court was so obviously wrong that it is beyond any possibility for fair-minded disagreement. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Petitioner's fourth objection is overruled.

In Petitioner's fifth objection, he argues that the R&R recommends a ruling contrary to statements in which the R&R agrees with his position. (Doc. 59 at 5.) Citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993), Petitioner particularly contends that the R&R's finding that the trial judge's *ex parte* communication with the jury was harmless is wrong because that communication allowed a conviction based only on identification and allowed the trial judge to act as a 13th juror in the case. The full quote from the R&R upon which Petitioner relies is:

> At most, the jury's question suggested that at least some jurors were prepared to convict solely on the basis of the photo identification, but only if that was permissible. Thus, the Court's response (tantamount to an instruction that they could permissibly do so) may indeed have been instrumental in their decision to convict. But that does not make juror testimony to that effect relevant. Why? Because courts begin with the presumption that juries comply with their instructions. "We generally presume that jurors follow their instructions." *Penry v. Johnson*, 532 U.S. 782, 799 (2001).

(Doc. 54 at 12.) Notably, the R&R explained that, if there is some question about what affected the jury's decision-making process, courts begin with the presumption that juries comply with their instructions. Looking to the jury instructions, the argument that the trial

judge's *ex parte* communication allowed a conviction based solely on identification, ignoring the other elements of the offense, fails. There is no reason to find that the *ex parte* communication caused the jurors to ignore the other instructions. And, the trial court's *ex parte* statement to the jury, "That's an issue for the jury to decide," in response to the question "Is positive photo identification enough to rule out reasonable doubt?" gave the jury no more instructions on the elements of the offense than the original instructions. It did not suggest to the jury how it should decide the case and it did not offer any opinion on the weight of the photo identification in relationship to the other elements described in the instructions. Petitioner's fifth objection is overruled.

Petitioner's sixth objection claims that the R&R erred by presuming that the state appellate court properly addressed his federal denial of counsel claim on the merits. Petitioner argues that the state court only adjudicated the merits of this claim under the state law harmless error standard instead of recognizing that structural error occurred when the judge entered the jury room because the state court decision did not mention *Bell v. Cone*, 535 U.S. 685 (2002) or *United States v. Cronic*, 466 U.S. 648 (1984). Moreover, he argues that the R&R should have *de novo* reviewed the claim because of the mixed questions of law and fact. To the contrary, the R&R correctly found that the state court addressed Petitioner's denial of counsel claim on the merits. The cases the state court relied on in rendering its decision were on point state cases that discussed and explained this federal constitutional right. Simply because the state court did not mention two cases cited by Petitioner, *Bell* and *Cronic*, does not establish that the state court did not address the claim on the merits. Because Petitioner has not presented facts rebutting the presumption that this court must follow—that the state court adjudicated the federal claim on the merits—the Court does not find error in the R&R's determination that the state court addressed merits of this claim. Petitioner does not point to material facts in dispute, and the Court has found none, warranting a *de novo* review. Petitioner's sixth objection is overruled.

Petitioner's seventh objection argues that when the judge communicated with the jury *ex parte*, it occurred at a "critical stage" of the proceedings, thereby requiring a finding of structural error and automatic reversal. The R&R correctly explained that the case upon which Petitioner's argument relies, *Cronic*, 466 U.S. 648, did not define "critical stage." *Rushen v. Spain*, 464 U.S. 114 (1983), cited by Petitioner, also does not define "critical stage," but does indicate that reversal should not be automatic when an *ex parte* communication between the court and a juror occurs. The Supreme Court in *Rushen* noted that, instead of automatic reversal, when the trial court has an *ex parte* communication with a juror, the court should hold a post-trial hearing to determine the effect of the communication and whether the court can mitigate constitutional error, if any:

> When an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing. The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred.

Id. at 119-20. In *Rushen*, the Supreme Court found that the state courts had convincing evidence that the jury's deliberations were not biased by the relevant undisclosed communication and that the lower federal courts should have deferred to the presumptively correct state court finding the constitutional error of the *ex parte* communication was harmless. *Id.* at 121. That same reasoning applies here. The R&R correctly applied the standard set out in *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004), that state courts have latitude in reaching reasonable outcomes in case-by-case determinations when the Supreme Court sets out a general rule. Here, the Court cannot find that the state court's decision was an unreasonable application of the Supreme Court's general rule. Petitioner's seventh objection is overruled.

Finally, Petitioner argues in his eighth objection that the trial judge's *ex parte* communication with the jury overcame all other instructions. Again, he insists that the jury was instructed to convict based on a photo identification without the need to find the

other required elements of the offense. However, the other jury instructions were clear, concise, accurate and legally correct. There was nothing about the judges' *ex parte* communication that eliminated, altered, or changed those instructions. The communication did not indicate that the jurors should give more weight to certain evidence than other evidence and merely correctly informed the jury that the question of whether a positive photo identification was enough to rule out reasonable doubt was a question for them to decide. Furthermore, this objection again raises a sufficiency of the evidence argument. As previously noted, the record includes Detective Ayala testimony that he asked Petitioner, whom he identified in court, for a specific amount of a specific drug, and Petitioner sold it to him. Petitioner's eighth objection is overruled. Accordingly,

IT IS ORDERED that Petitioner's Objection to the R&R (Doc. 59) is **OVERRULED**.

IT IS FURTHER ORDERED that the R&R (Doc. 54) is **ACCEPTED**.

IT IS FURTHER ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 8) is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that Petitioner's partial motion for summary judgment (Doc. 62), which reiterates the arguments made in Petitioner's Objection to the R&R, is **DENIED.**

IT IS FURTHER ORDERED that, because jurists of reason would not find the assessment of the constitutional claims herein debatable or wrong, Petitioner's Alternate Petition to Grant Certificate of Appealability and to Certify Questions for Review by the Ninth Federal Circuit of Appeals (Doc 57) is **DENIED.**

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED** because jurists of reason would not find the assessment of the constitutional claims herein, debatable or wrong.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment denying and dismissing Petitioner's Amended Petition for Writ of Habeas Corpus filed

pursuant to 28 U.S.C. § 2254 (Doc. 8) with prejudice, terminate all pending motions, and close this case.

Dated this 21st day of July, 2021.

Douglas L. Rayes
United States District Judge

EXHIBIT # 5

ORDER DENYING CERTIFICATE of APPEALIBILITY

U.S. COURT of APPEALS 9

21-16273

DECIDED APRIL 29, 2022

FILED

APR 29 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDY SCOTT DIEHL, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 21-16273 D.C. No. 2:19-cv-01568-DLR District of Arizona, Phoenix ORDER

Before: GRABER and TALLMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

EXHIBIT # 6

PCR RULING

MARICOPA SUPERIOR COURT

CR2015-1922-001-DT

DECIDED AUGUST 7, 2018

Chris DeRose, Clerk of Court
*** Electronically Filed ***
08/13/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-001922-001 DT

08/07/2018

COMMISSIONER COLLEEN L. FRENCH

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

JEFFREY R DUVENDACK

v.

RANDY S DIEHL (001)

RANDY S DIEHL
245140 ASPC EYMAN MEADOWS
PO BOX 3300
FLORENCE AZ 85132
SHERI M LAURITANO

COMM. FRENCH
COURT ADMIN-CRIMINAL-PCR

PCR RULING

The Court has received and reviewed the following documents relative to Petitioner's request for post-conviction relief:

- Petitioner's Petition for Post-Conviction Relief;
- Petitioner's Supplemental Brief on 1st Post-Conviction Review Pursuant to Rule 32, et seq;
- Defendant-Petitioner's Motion for Evidentiary Hearing and Request for Witness Subpoenas;
- Response to Petition for Post-Conviction Relief;
- Petitioner's Reply to State's Response to Petition for Post-Conviction Relief; and
- Petitioner's Amended Reply to State's Response to Post-Conviction Petition.

The Court finds that Petitioner's Petition for post-conviction relief must be denied. Specifically, Petitioner's claim that the trial court erred in denying his motion to suppress, and his claims of prosecutorial misconduct are precluded under Arizona law. Additionally, Petitioner

M-107

has not established any colorable claim of ineffective assistance of counsel or "actual innocence." Therefore,

IT IS ORDERED summarily denying Petitioner's Petition for Post-Conviction Relief.

IT IS FURTHER ORDERED denying Petitioner's Motion for Evidentiary Hearing and Request for Witness Subpoenas as moot.

EXHIBIT # 7

MEMORANDUM DECISION DENYING PCR RELIEF

ARIZONA COURT of APPEALS

1CA-CR18-0632 PRPC

DECIDED JANUARY 22, 2019

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Respondent,*

v.

RANDY S. DIEHL, *Petitioner.*

No. 1 CA-CR 18-0632 PRPC
FILED 1-22-2019

Petition for Review from the Superior Court in Maricopa County
No. CR2015-001922-001
The Honorable Colleen L. French, Judge *Pro Tem*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Jeffrey R. Duvendack
Counsel for Respondent

Randy S. Diehl, Florence
Petitioner

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones, Vice Chief Judge Peter B. Swann, and Judge David D. Weinzweig delivered the decision of the Court.

PER CURIAM:

¶1 Randy Diehl seeks review of the superior court's order dismissing his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is the petitioner's first petition.

¶2 Absent an abuse of discretion or error of law, this Court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 576-77, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion in denying the petition. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011).

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

¶4 Accordingly, we grant review and deny relief.

Certificate of Compliance

Pursuant to Rules of the Supreme Court, R 33(2), petitioner Diehl certifies that this petition complies in format, length, and substance provided for by R 14 of the Rules of the Supreme Court.

June 13, 2022 — R Diehl

Date — Randy Scott Diehl