PETITION APPENDIX

TABLE OF APPENDICES

APPENDIX A

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL ALEXANDER RODRIGUEZ, Petitioner-Appellant, v. STEPHEN MORRIS; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-16024 D.C. No. 2:19-cv-04957-GMS MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, Chief District Judge, Presiding

Argued and Submitted March 8, 2022
Phoenix, Arizona

Before: PAEZ, CLIFTON, and WATFORD, Circuit Judges.

Daniel A. Rodriguez appeals the district court's denial of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The narrow certified issue on appeal is whether Rodriguez's ineffective assistance of appellate counsel ("IAAC")

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

claim qualifies as cause to excuse the procedural default of his prosecutorial misconduct claim.[1] We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm.

Rodriguez was convicted by a jury in Arizona state court of various felonies in connection with his role in two shootings during a dispute with his girlfriend. On direct appeal, his counsel declined to raise the issue of prosecutorial misconduct in favor of a Fourth Amendment issue. After the appeal was unsuccessful, Rodriguez filed a habeas petition in state court raising ineffective assistance of trial counsel, trial judge abuse of discretion, prosecutorial misconduct, and IAAC. The state trial court denied habeas relief, in part because Rodriguez had waived his prosecutorial misconduct claim by failing to raise it on direct appeal and because any deficient performance on the part of defense counsel did not prejudice Rodriguez. The Arizona Court of Appeals granted review but denied relief in a short summary order, and the Arizona Supreme Court denied review altogether.

Under Arizona law, the failure to raise an issue that could have been raised on direct appeal is a procedural bar to habeas review on the merits. *State v. Petty*,

[1] Rodriguez's Opening Brief presents uncertified issues outside the scope of the district court's Certificate of Appealability ("COA"). We decline to expand the COA to reach those issues. *See* 28 U.S.C. § 2253(c)(2).

238 P.3d 637, 640 (Ariz. Ct. App. 2010) (citing Ariz. R. Crim. P. 32.2(a)). Here, then, Rodriguez's failure to raise prosecutorial misconduct on direct appeal means the issue was procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991); *Lee v. Davis*, 328 F.3d 896, 899–900 (7th Cir. 2003). Rodriguez is therefore only entitled to federal habeas review on the merits of his prosecutorial misconduct claim if he shows that the procedural default is excused by cause and prejudice. *See Atwood v. Ryan*, 870 F.3d 1033, 1059 (9th Cir. 2017).

Rodriguez argues that his IAAC claim based on appellate counsel's failure to raise prosecutorial misconduct on direct appeal constitutes cause to excuse the default of the prosecutorial misconduct claim. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). We analyze Rodriguez's IAAC claim in the cause-and-prejudice context de novo.[2] *Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016).

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[2] We need not reach the question of whether Rodriguez's IAAC claim establishes an independent substantive basis for habeas relief because that question is outside the scope of the COA. In any event, because we conclude that appellate counsel's performance was not constitutionally ineffective, it follows that we would not disturb the state habeas court's adjudication of that claim on the merits. *See* 28 U.S.C. § 2254(d) (barring relitigation of any claim "adjudicated on the merits" in state court unless the decision was contrary to or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented); *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (a claim not dismissed for procedural reasons is presumed to be decided on the merits).

To establish cause, Rodriguez must show that he was deprived of his constitutional right to effective counsel in violation of the Sixth Amendment. *Id.* To do that, Rodriguez must first have presented IAAC as an independent claim in state court. *Edwards v. Carpenter*, 529 U.S. 446, 452–53 (2000). Because he raised the claim in his state habeas petition, he satisfies that threshold inquiry. He next must establish that his appellate counsel's performance was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel is ineffective under *Strickland* if the lawyer's performance was objectively unreasonable and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The "mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Carrier*, 477 U.S. at 486; *see also Moorman v. Ryan*, 628 F.3d 1102, 1106–07 (9th Cir. 2010).

Because we conclude that Rodriguez was not prejudiced by counsel's failure to raise prosecutorial misconduct on direct appeal, we need not decide whether counsel's performance was deficient. *See Jackson v. Calderon*, 211 F.3d 1148, 1155 n.3 (9th Cir. 2000). We conclude that Rodriguez was not prejudiced because there is not a "reasonable probability" that the outcome of his direct appeal would

have been different had counsel raised prosecutorial misconduct. *Cf. Strickland*, 466 U.S. at 694.

To warrant reversal for prosecutorial misconduct under Arizona law, "the conduct must have been so pronounced and persistent that it permeated the entire trial and probably affected the outcome." *State v. Bolton*, 896 P.2d 830, 847 (Ariz. 1995). Arizona courts consider whether the prosecutor's actions were "reasonably likely to have affected the jury's verdict, thereby denying [the] defendant a fair trial." *Id.* (citation omitted). Courts review the "cumulative misconduct" to decide whether the "total effect" rendered the trial unfair. *State v. Hulsey*, 408 P.3d 408, 429 (Ariz. 2018).

We are not convinced that there is a reasonable probability that an Arizona court would have ordered a new trial based on the prosecutor's conduct here. First, the state habeas court expressly rejected Rodriguez's claim of ineffective assistance of trial counsel for failing to object to certain misconduct, finding that any deficient performance did not prejudice Rodriguez's defense or render different trial results than would have been achieved through competent performance. If an Arizona court was unwilling to order a new trial based on trial counsel's failure to object to misconduct, we see no reason to conclude that the

same court would have done so based on appellate counsel's failure to raise the same misconduct on appeal.

Second, much of the alleged misconduct was waived for lack of contemporaneous objection at trial such that it could only be overcome on appeal by a showing of fundamental error. *State v. Hughes*, 969 P.2d 1184, 1197 (Ariz. 1998) (en banc). We cannot conclude that the waived misconduct constituted fundamental error. *See id.*

Third, we do not conclude that an Arizona court would have found that the instances of misconduct were "so pronounced and persistent" to have "permeated the entire trial and probably affected the outcome." *Bolton*, 896 P.2d at 847. The most serious allegation in our view is that the prosecutor implied that the threatening text messages were recovered on Rodriguez's phone, when in fact they were not. Although we acknowledge that the prosecutor mischaracterized the source of the threatening text messages to corroborate other witness testimony, the record contains other evidence linking Rodriguez to those messages and connecting him to the shootings. In our view, the evidence regarding the text messages was cumulative of other properly presented evidence. Our conclusion is bolstered by the state habeas court's conclusion that any deficient performance by trial counsel would not have rendered different results at trial. Even accepting—as

the district court below did—that the prosecutor engaged in some "instances of misconduct or near misconduct, altogether it was not so prolonged or pronounced that it affected the fairness of trial." *Hulsey*, 408 P.3d at 429–30.

In summary, Rodriguez has not shown that his appellate counsel was constitutionally ineffective under *Strickland*. The district court therefore properly held that Rodriguez did not establish cause and prejudice necessary to excuse the procedural default of the prosecutorial misconduct claim. That claim is therefore not entitled to federal habeas review on the merits.

AFFIRMED.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Daniel Alexander Rodriguez, Petitioner, v. Stephen Morris, et al., Respondents.	No. CV-19-04957-PHX-GMS **ORDER**

Before the Court is a Report and Recommendation ("R&R") (Doc. 35) issued by Magistrate Judge Michelle H. Burns recommending that the Court grant Petitioner Daniel Alexander Rodriguez's ("Petitioner") Motion under 28 U.S.C. § 2254 challenging his convictions in the Maricopa County Superior Court, (Doc. 1). Respondents timely filed an objection to the R&R. (Doc. 36.) For the following reasons, the Court grants in part the Respondents' Objection, adopts in part and declines to adopt in part the R&R, and denies the Petitioner's Motion.

BACKGROUND

As no party has objected to the procedural background set forth in the R&R, the Court adopts the background as set forth therein:

> Petitioner was indicted by an Arizona Grand Jury on February 24, 2014, on fourteen separate felony counts: two counts of Discharge of a Firearm at a Structure, class 2 dangerous felonies (counts one and eleven); four counts of Aggravated Assault, class 3 dangerous felonies (counts two, three, twelve and thirteen); one count of Aggravated Assault, a class 3

dangerous felony and a domestic violence offense (count fourteen); four counts of Disorderly Conduct, class 6 dangerous felonies (counts four through seven); one count Misconduct Involving Weapons, a class 4 felony (count eight); one count Forgery, a class 4 felony (count nine); and one count Taking Identity of Another, a class 4 felony (count ten). (Doc. 11, Exh. A.) Counts one through seven related to a shooting incident that occurred on January 31, 2014; and counts eleven through fourteen related to a shooting incident that occurred on February 14, 2014. (Id.)

Petitioner proceeded to trial, and was convicted of the lesser-included offense of Discharge of a Firearm at a non-residential structure (count one), the lesser-included offense of Disorderly Conduct (counts two and three), and as charged on the remaining counts. (Id., Exhs. L, N.) The jury further found counts one through seven, and ten through thirteen to be dangerous offenses. (Id.) On January 23, 2015, Petitioner was sentenced as a repetitive offender with two prior felony convictions to a total of 42.7[5] years in prison. (Id., Exh. N.) Petitioner appealed his judgment and sentence, and the Arizona Court of Appeals, in affirming, set forth the following factual background:

> ¶ 2 A grand jury indicted defendant on fourteen felony counts stemming from his behavior in several 2014 incidents. The first incident occurred during a fight between defendant and his then 16 year-old former girlfriend (A.G.). The two were riding in defendant's burgundy Mercury Montego when victim fled the vehicle. Defendant screamed at her repeatedly to get back in the car. Eventually defendant pulled a 9mm weapon out and shot multiple times in her general direction to get her "attention." Witnesses heard A.G. crying hysterically "let me just go home," heard the defendant yelling at her, heard the gun shots and heard his car speeding off. A.G. testified she was scared and had gotten back in the car. One of the witnesses found three bullet holes in and around his house. Two 9mm shell casings were found at the scene. This event is the factual basis for Counts 1- 7.
>
> ¶ 3 Counts 8 and 9 involve defendant using the identification of his brother N.R. Count 8 results from defendant presenting the false identification to an officer when that officer came into contact with defendant and A.G. during a loud fight in a parking lot days after the first shooting event. Count 9 results from defendant presenting N.R.'s identification to purchase the 9mm gun from a pawnshop. [Evidence showed that defendant used his brother's identification to buy both the 9mm gun and the burgundy Montego, as well as 9mm ammunition.] The false identification was found in defendant's

> vehicle and A.G. was present both times it was used. ¶ 4 A couple of weeks after the first shooting, victim attempted to break up with defendant. Defendant texted her numerous threatening messages over two days. Those texts, as testified to and as recovered in defendant's phone, included: "tell your momma not to sleep on the couch cuz a bullet might hit her" and "Be ready ... I got 83 rounds" and "we both gonna die." [] A terrified A.G. called the police. Defendant then called A.G. and asked her to come outside, she refused; ten minutes later defendant fired multiple gunshots at her house. Approximately eight bullets travelled into the interior of A.G.'s house. A.G. provided police with a detailed description of defendant's car, including his license plate number, and advised them that defendant had a gun he'd recently purchased under a driver's license in N.R.'s name. This second shooting event is the basis for Counts 11-14.
>
> ¶ 5 After an active search for defendant, which included him driving from location to location, he was arrested later that same day while getting into his vehicle. He was taken into custody from the driver's seat. A protective sweep of the car was done at that time; officers knew that defendant was the suspect in a crime involving a gun and was potentially armed. The vehicle was then towed to the police substation while officers waited for a search warrant to issue. Police searched the vehicle pursuant to a search warrant in the early morning hours at the police substation. Inside the car officers found a 9mm bullet, two bullet shell casings, the sales receipt for the 9mm gun, and a cell phone containing the threatening texts. One shell casing and one live round were on the floor of the vehicle; another shell casing was in the trunk. Police testified that the shell in the interior of the vehicle was lodged under the carpet and took some rooting around to find.

(Doc. 11, Exh. S.)

In Petitioner's opening brief in the Arizona Court of Appeals, he raised the following issues: (1) unlawful search and seizure of Petitioner's vehicle after his arrest, and (2) the trial court improperly shifted the burden of proof onto Petitioner during the suppression hearing. (Id., Exh. P.) On March 15, 2016, the appellate court affirmed Petitioner's convictions and sentences, finding no error in the trial court's denial of his motion to suppress. (Id., Exh. S.) Petitioner filed a petition for review in the Arizona Supreme Court, claiming that the lower court erred in denying his claims regarding the search and seizure of his vehicle. (Id., Exh. T.) The Arizona Supreme Court summarily denied review on September 15, 2016. (Id.,

Exh. U.)

On February 18, 2016, Petitioner filed a pro se notice of post-conviction relief ("PCR"), which his counsel moved to dismiss without prejudice as Petitioner's direct appeal was still pending. (Doc. 11, Exhs. V, X.) The trial court granted the motion. (Id., Exh. Y.) After the conclusion of direct review, on September 18, 2016, Petitioner filed a pro se notice of PCR, indicating that he was raising a claim of ineffective assistance of counsel ("IAC"), and was not requesting the appointment of counsel to represent him. (Id., Exh. [Z].) The trial court set a briefing schedule. (Id., Exh. AA.) Pursuant to a subsequent request by Petitioner, the trial court appointed advisory counsel to assist him. (Id., Exh. BB.) On November 14, 2016, Petitioner filed his PCR petition, raising the following claims:

A.) IAC: trial counsel.

1. Trial counsel's failure to object to prosecutor's improper voir dire question identifying one of the victims as a child.

2. Trial counsel's failure to object to the introduction of text messages.

3. Trial counsel's making prejudicial statements in front of the jury and failing to move for a mistrial.

4. Trial counsel's failure to impeach a law enforcement witness as to the suggestiveness of a photo line-up.

5. Trial counsel's failure to object to the prosecution's laptop being provided to the jury.

B.) Prosecutorial misconduct, by making improper remarks during voir dire, using "staged" testimony to introduce inadmissible evidence, and making improper statements to inflame the passions of the jury.

C.) Trial judge's abuse of discretion.

1. Trial court abused its discretion by not investigating jury panel for bias.

2. Trial court abused its discretion by overruling multiple hearsay objections by Petitioner's counsel.

3. Trial court abused its discretion by not declaring a mistrial after prosecutor made improper argument in closing statements.

4. The trial court was without jurisdiction to render judgment on count 10, as it did not allege the place of the continuing offense in count.

D.) IAC: appellate counsel - for not raising all of the above claims. (Id., Exh. CC.)

The trial court denied Petitioner PCR relief, reasoning as follows:

> The defendant failed to raise his claims of prosecutorial misconduct and abuse of discretion by the trial court in his direct appeal. Further, based on the allegations in the PCR request, the Court finds that defense counsel's performance did not fall below prevailing professional norms and that no deficient performance on the part of defense counsel

> prejudiced Mr. Rodriguez's defense or rendered different trial results than would have been achieved through competent performance. The Court also does not find that Defendant has stated a colorable claim for abuse of discretion by the trial court. As to one specific issue raised in that regard, the court reporter recently filed an Affidavit of Correction indicating that a statement that had been attributed in the trial transcript to defense counsel was, in fact, defendant's statement. The correction makes clear why the Court did not address the defense attorney for making such comment, since the comment was not made by him. Accordingly, and for the other reasons stated in the State's response [it is ordered denying PCR relief].
>
> (Doc. 11, Exh. FF.)
>
> Petitioner filed a petition for review of that decision in the Arizona Court of Appeals. (Id., Exh. GG.) On January 4, 2018, the Court of Appeals granted review, but denied relief, holding that Petitioner had failed to meet his burden to show that the trial court abused its discretion in its denial of PCR relief. (Id., Exh. II.) Petitioner subsequently filed a petition for review of the appellate court decision in the Arizona Supreme Court. (Doc. 1 at 36-209.) The Arizona Supreme Court summarily denied review on August 24, 2018. (Id. at 211.)
>
> Petitioner filed his habeas petition on August 13, 2019. In his petition, Petitioner asserts the following claims: (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, and (3) prosecutorial misconduct. (Doc. 1.)

(Doc. 35 at 1–6.)

DISCUSSION

I. Standards of Review

A district judge may refer dispositive pretrial motions, and petitions for writ of habeas corpus, to a magistrate judge, who shall conduct appropriate proceedings and recommend dispositions. *Thomas v. Arn*, 474 U.S. 140, 141 (1985); *see also* 28 U.S.C. § 636(b)(1)(B); *Estate of Connors v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993). Any party "may serve and file written objections" to a report and recommendation by a magistrate judge. 28 U.S.C. § 636(b)(1). "A judge of the court shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made." *Id.* District courts, however, are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Arn*, 474 U.S. at 149. A district judge

"may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." 28 U.S.C. § 636(b)(1). However, "while the statute does not require the judge to review an issue de novo if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under a de novo or any other standard." *Arn*, 474 U.S. at 154.

Further, a district court may review a magistrate judge's ruling on a "pretrial matter not dispositive of a party's claim or defense." Fed. R. Civ. P. 72(a). For non-dispositive orders, a district court "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.* The clearly erroneous standard applies to findings of fact and the contrary to law standard applies to legal conclusions. *See Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 422 (C.D. Cal. 1999). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. of Cal. Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Jadwin v. Cnty. of Kern*, No. CV-F-07-026 OWW/TAG, 2008 WL 4217742, at *1 (E.D. Cal. Sept. 11, 2008) (quoting *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 163 (E.D.N.Y. 2006)). In reviewing a non-dispositive pretrial order, in no event may the district court "simply substitute its judgment for that of the deciding court." *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

II. Prosecutorial Misconduct & Ineffective Assistance of Appellate Counsel

A. Legal Standard

The writ of habeas corpus affords relief to persons in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241(c)(3) (2006). Review of Petitions for Habeas Corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.*; 28 U.S.C. § 2244 et seq.

1. Procedural Default & Exhaustion

A petitioner is required to exhaust his claims in state court before bringing them in a federal habeas action. 28 U.S.C. § 2254(b)(1)(A). In this context, exhaustion requires a petitioner to "give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). In Arizona, a petitioner is required to "fairly present" all claims he seeks to assert in his habeas proceeding first to the Arizona Court of Appeals either through direct appeal or the state's post-conviction relief proceedings. *See id.* at 848; *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999).

For a petitioner to have fairly presented his claims to the appropriate state courts, he must have described the operative facts and the federal legal theory that support his claim. *See Baldwin v. Reese*, 541 U.S. 27, 29, 31 (2004); *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009) (per curiam). The petitioner must alert the state court to the federal nature of the right he claims, and broad appeals to "due process" and similar concepts are insufficient. *See Johnson v. Zenon*, 88 F.3d 828, 830–31 (9th Cir. 1996) ("While he did assert that the admission of the prior act evidence 'infringed on his right to present a defense and receive a fair trial,' the assertion was made in the course of arguing that the evidentiary error was not harmless under state law. Because Johnson never apprised the state court of the federal nature of his claim, he has not satisfied the fair presentation prong of the exhaustion requirement."); *Hivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion.").

If a petitioner has failed to "fairly present" his federal claims to the state courts—and has therefore failed to fulfill AEDPA's exhaustion requirement—the habeas court must determine whether state remedies are still available for the petitioner; if not, those claims are procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). A petitioner can suffer a procedural default if the state court rejected the claim not on the merits, but because the petitioner failed to comply with a procedural rule. "A state court's

invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *see also Coleman*, 501 U.S. at 729–30 ("The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds."). Arizona has several rules that petitioners must follow when they seek to present claims in post-conviction relief proceedings; failure to comply with those rules results in a procedural default. *See, e.g.*, Ariz. R. Crim. P. 32.2(a). For example, if a petitioner seeks to bring a claim for the first time in a post-conviction relief proceeding that was available on appeal, the court can find the claim barred because a petitioner cannot bring claims in collateral proceedings that were available on appeal. *See id.* 32.2(a)(1). When the state court invokes that procedural rule, its judgment rests on a provision of state law that is both adequate and independent of the merits. Thus, a court in a federal habeas proceeding will accept the state court's procedural ruling and find the petitioner's claim defaulted. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (upholding reliance on Arizona's Rule 32 as an adequate and independent state ground).

Still, a petitioner can overcome a procedural default. A habeas court will consider claims the petitioner has procedurally defaulted only if he can demonstrate (1) cause for his failure to comply with state rules and actual prejudice or, in the very rare instance, (2) that a miscarriage of justice would occur. *See Dretke v. Haley*, 541 U.S. 386, 388–89 (2004). "Cause" means "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). It can include a claim that petitioner's counsel provided ineffective assistance that caused the default. *Id.* at 488–89. But that ineffective assistance of counsel claim itself must have been properly presented to the state courts for it to serve as cause to excuse a procedural default. *Id.* Even if a petitioner demonstrates cause for a procedural default, he

must nevertheless show "prejudice" or that the supposed constitutional error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Finally, a miscarriage of justice is shorthand for a situation "where a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent' of the substantive offense." *Dretke*, 541 U.S. at 393 (quoting *Murray*, 477 U.S. at 496).

2. State Court Decision on the Merits

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A decision is "contrary to" Supreme Court precedent if "the state court confront[ed] a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrive[d] at a result different from [Supreme Court] precedent." *Vlasak v. Super. Ct. of Cal. ex rel. Cnty. of Los Angeles*, 329 F.3d 683, 687 (9th Cir. 2003) (alterations in original). A decision is an "unreasonable application" if "the state court identified the correct legal principles, but applied those principles to the facts of [the] case in a way that was not only incorrect or clearly erroneous, but objectively unreasonable." *Id.* It is not enough that independent review of the legal question leaves a court with "a firm conviction that the state court decision was erroneous." *Id.*

In habeas review, the Court must begin by applying a presumption, subject to rebuttal, that a state court adjudicated all claims presented to the state court on the merits. *Johnson v. Williams*, 568 U.S. 289, 293 (2013). Thus, if a federal claim was presented to the state court and the state court denied all relief without specifically addressing the federal claim, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991)). When the last reasoned state decision agrees with and substantially incorporates the reasoning from a previous state court decision, courts may consider both decisions to fully understand the reasoning of the last decision. *See Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014).

B. Analysis

1. Procedural Posture

Plaintiff's Petition for Habeas Corpus seeks relief for four wrongs: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel ("IAAC"); (3) prosecutorial misconduct; and (4) abuse of discretion of the trial court judge. Respondents object to the Magistrate Judge's conclusions concerning IAAC and prosecutorial misconduct.

First, Petitioner's IAAC claim has already been addressed on the merits. Petitioner raised IAAC in his PCR petition, asserting his appellate counsel was ineffective for not raising the cognizable claims contained in the petition. (Doc. 11-2 at 19.) The Arizona Court of Appeals wrote the last reasoned decision addressing the PCR petition and concluded that the trial court's decision denying the petition was not an abuse of discretion. (Doc. 1 at 33.) Thus, the trial court's opinion was impliedly incorporated into the Court of Appeal's reasoning. As the trial court explained:

> based on the allegations in the PCR request, the Court finds that defense counsel's performance did not fall below prevailing professional norms and that no deficient performance on the part of defense counsel prejudiced Mr. Rodriguez's defense or rendered different trial results than would have been achieved [by] competent performance. . .
>
> Accordingly, and for other reasons set forth in the State's response,
>
> IT IS HEREBY ORDERED summarily denying the Defendant's Petition for Post-Conviction Relief, filed November 21, 2016.

Id. at 28–29. The trial court's finding "that no deficient performance on the part of the defense counsel prejudiced" Petitioner necessarily reflects on the merits of Petitioner's

IAAC claim. If trial counsel's failure to object to the prosecutor's statements was non-prejudicial to the Petitioner's defense, then the likelihood of success of the claims and the severity of the wrongs must also be unlikely to constitute prejudice on appeal. Different outcomes could only coexist if the trial court's finding of no prejudice, and the appellate court's affirmation of that outcome, was a violation of clearly established federal law.

Moreover, although the trial court's explicit reasoning regarding ineffective assistance of counsel seems to be principally directed at the performance of trial counsel, the court also denied the petition for the "other reasons set forth in the state's response." *Id.* The State's Response included an argument that appellate counsel's performance was not constitutionally deficient:

> Defendant claims that appellate counsel was ineffective "for not raising the cognizable claims [in Defendant's petition] on direct appeal after notification of such." (Defendant's Petition at 13.) However, "[a] strong presumption exists that appellate counsel provided effective assistance. Appellate Counsel is responsible for reviewing the record and selecting the most promising issue to raise on appeal. As a general rule, '[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.'" *State v. Bennet*, 213 Ariz. 562, 567, 146 P.3d 63, 68 (2006) (citations omitted). As noted in the letter sent by appellate counsel to Defendant, additional claims were not filed as a "strategic matter" because "[t]he case law [appellate counsel] found did not support the arguments."

(Doc. 11-2 at 47–48.) The trial court's incorporation of this argument demonstrates, under the extremely deferential habeas standard, that it addressed the IAAC claim on the merits. Petitioner is thus entitled to relief only if the trial court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).[1]

Second, Petitioner's prosecutorial misconduct claim is procedurally defaulted. The trial court found: "The Court agrees with the State's response that defendant fails to raise

[1] Petitioner contends that, because the State argued procedural default in its PCR Response instead of addressing the merits of prosecutorial misconduct, the trial court's reasoning cannot apply to the prosecutorial misconduct appeal. (Doc. 37 at 5.) This distinction overlooks the significant deference afforded to trial courts when determining whether an issue has been decided on the merits. *Johnson*, 568 U.S. at 293. Because the Response also contains explicit argument addressing IAAC, the trial court's opinion addresses the claim on the merits.

a colorable claim for relief. The defendant failed to raise his claims of prosecutorial misconduct and abuse of discretion by the trial court in his direct appeal." (Doc. 1 at 28.)

Petitioner alleges his appellate counsel's failure to raise the prosecutorial misconduct claims in his PCR petition on direct appeal amounted to ineffective assistance of counsel and constitutes cause to excuse the procedural default of his prosecutorial misconduct claim. An appellate counsel's failure to preserve an issue for appeal can establish cause to excuse procedural default if the failure was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). However, because the trial court has already addressed Petitioner's ineffective assistance of trial counsel and IAAC claim on the merits, Petitioner must establish that the trial court's rejection of these claims was "contrary to, or involved an unreasonable application of, clearly established Federal law" to establish cause to excuse his procedural default. 28 U.S.C. § 2254(d); *see Torres v. Ryan*, No. CV-17-08227-PCT-DJH, 2021 WL 512231, at *6 n.5 (D. Ariz. Feb. 11, 2021) ("[T]he Court also finds, as discussed infra, that the PCR court's dismissal of Petitioner's independent ineffective assistance of counsel claims was not 'an unreasonable application of[ ] clearly established Federal law[.]' . . .The fact that Petitioner's independent ineffective assistance of counsel claims lack merit underscores the conclusion that appellate counsel's conduct does not and cannot constitute cause to excuse Petitioner's procedural defaults."); *Scott v. Smith*, No. 3:10-CV-00754-LRH, 2011 WL 1882392, at *4 (D. Nev. May 16, 2011).

Thus, both of Petitioner's claims, IAAC and prosecutorial misconduct, turn on whether the trial court's denial of his IAAC claim was contrary to or involved an unreasonable application of federal law. To the extent that the IAAC claim relies on trial counsel's failure to object to the several instances of prosecutorial misconduct that occurred at trial, the PCR court has already considered and rejected the claim that trial counsel was ineffective at trial. Thus, unless the PCR court's determination in this respect was an "unreasonable application of clearly established federal law," petitioner can neither establish prejudice sufficient to cure the procedural default on prosecutorial misconduct

issue, nor can he prevail on the merits of the IAAC claim.

2. Prosecutorial Misconduct

Petitioner alleges that the Prosecutor engaged in a number of instances of misconduct during his closing argument at trial. This Court agrees with and accepts the R&R's recommended finding in some particulars; the prosecutor at least somewhat misstated the testimony of Celene Bensink in his closing argument. This Court, further, accepts the R&R's conclusions that in his closing the prosecutor also committed misconduct in: (1) vouching for the victim's testimony by asserting she was not a liar; (2) vouching for Detective Hiticas' testimony by inventing an explanation for the absence of the gun used in the offense; and (3) burden shifting by referencing the undisputed nature of the testimony where the Petitioner was the only eye-witness who could dispute the victim's account of the incident. It, however, rejects the R&R's recommended finding that the prosecutor committed misconduct in misstating the testimony of the Tindall family, in misstating the testimony pertaining to the source of text messaging, in misstating the evidence as it pertains to the Defendant's purchase of ammunition at the Walmart, or in denigrating defense counsel.

In evaluating the PCR court's determination that the trial counsel's representation was not ineffective, this Court examines whether the PCR court's conclusion violates any "clearly established federal law." To assess the alleged misconduct, and the effectiveness of trial counsel and the trial court in responding to it, this Court considers the nature of the misconduct, whether an objection was made, the extent of any curative measures, and whether, applying the appropriate deferential standard, the state PCR court accurately determined that Petitioner received a fair trial and that there was no ineffective assistance of either trial or appellate counsel. To conduct any of these inquiries, the Court must examine the alleged misconduct at trial.

3. Statements at Trial Which Did Not Rise to the Level of Misconduct

a. Misstating the Testimony

When considering a claim of prosecutorial misconduct, courts consider whether the

prosecutor manipulated or misstated the evidence. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). Prosecutors must not "base closing arguments on evidence not in the record." *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989). They are however, "granted reasonable latitude to fashion closing arguments" and may "argue reasonable inferences from the evidence." *Id.* Petitioner asserts that the prosecutor misstated three types of evidence in closing arguments: (1) witness testimony; (2) the content and meaning of the text messages introduced as evidence; and (3) evidence that Petitioner purchased ammunition at Walmart.

i. The Tindalls

As no party has objected to the account of the Tindall's testimony set forth in the R&R, the Court adopts the description as set forth therein:

> Three other individuals who lived on a street near where the January incident took place, testified regarding their knowledge of the July 31st incident: Tammy Tindall and her 18-year old daughter Kiahra, and Tammy's boyfriend Damien Mitchell. (Doc. 23-1 at 818.) Tammy testified that she was awakened by the sound of a male and female arguing, and then heard around 4 gunshots. (Id. at 819-821.) She ran to check on her children and met her oldest, who had also heard the commotion, at her door. (Id.) She proceeded to check on the younger kids, but they had slept through it. (Id. at 821.) Kiahra Tindall testified that she was watching television when she heard an argument from the street between a male and female. (Id. at 831-32.) She heard the male voice command the female to get into the car, shortly thereafter heard 4 or 5 gunshots, then heard a car door slam and the car drive away. (Id. at 830-38.) Damien testified that he was asleep when he was awakened by an argument between a man and a woman, and heard the female indicate that she wanted to go home and the male telling her she was going to stay with him. (Id. at 808-810.) He then heard gunshots. (Id.) Within a few minutes, the County Sheriff Officers arrived and knocked on their door. (Id. at 811-12.) None of the three witnesses observed the individuals involved.

(Doc. 35 at 26.)

The prosecutor summarized the Tindalls' testimony and its effect in his closing argument. In doing so, he characterized their experience during the incident: "Damien Mitchell, Tammy Tindall, Kiahra Tindall running throughout the house, taking cover, checking to see if the kids, little children, are safe. Innocent victims." (Doc. 23-1 at 1487.)

He also repeatedly emphasized that the "whole Tindall family" corroborated the victim's testimony although only three members of the family testified at trial. *Id.* at 1533.

Trial Counsel did not object to the prosecutor's characterization of the Tindall's testimony. The Court finds these references fair inferences in light of the evidence presented. Tammy Tindall testified that she "flew" out of bed and checked on her children after being woken by the disturbance. *Id.* at 820. And characterization of similar testimonies as coming from "the Tyndall Family" where multiple family members testified, even if not the entire family, did not grossly misstate the evidence presented.

ii. Text Messages

The prosecution introduced two types of messages at trial: (1) text messages, some of which came from the Petitioner's phone and some of which were found only on the victim's phone but purported to be from the Petitioner; and (2) messages the victim received through an application called HeyWire. This second group of messages contained threats to the victim, and the victim testified she believed them to be from the Petitioner. They were not, however, located on Petitioner's cell phone. At trial, the prosecutor did not clearly distinguish between these two categories of messages. Petitioner argues that his discussion of the messages thus amounted to misrepresentations of the evidence to the jury.

During questioning, however, Detective Hiticas distinguished between the two types of messages:

> Q Just so we're clear, the text messages we saw on [redacted]'s phone, were those lining up to the same text messages on Daniel's phone, and the data and everything, once you got all of that?
> A Correct. Anything that wasn't either erased or used through the text messaging application on the smart phones.

Id. at 1324. During closing arguments, the prosecutor referred back to the messages:

> [The victim] told you about the threats and the text messages. She told you about the phone call right before this happened, where he's telling her he's going to shoot up the house, essentially. She told you all about that, all of which is corroborated by her cell phone record and the text messages found on her phone, and also found and corroborated on the defendant's phone.

Id. at 1493–94. And later in the argument:

> Again, [redacted]'s not lying about anything. Everything she's telling is the

> truth and is corroborated by independent sources. The 2/14 shooting. [redacted] tells you about phone calls from the defendant. Those are corroborated by her phone and the defendant's phone. Detective Hiticase told you that he looked at both phones, and that they both matched up. Of course, there was some deleted text messages on the defendant's phone, but the ones that weren't deleted, everything matched up. The phone calls, the phone logs, the text messages.

Id. at 1501. Trial Counsel objected to the prosecutor's characterization of the text message testimony. The trial court overruled the objection, concluding that "[t]he jury will determine whether any of the argument correctly states what the evidence is." *Id.* at 1534. Regardless, although Petitioner is correct that not all the messages admitted into evidence were corroborated across multiple devices, the prosecutor's representations were a fair picture of the evidence. The prosecutor's ambiguous references to "messages" included those which were confirmed across devices. Although there were other messages that did not have this corroboration, the prosecutor made no explicit indication that he was referring to them. During the testimony, Detective Hiticas also clearly differentiated between the two methods of messaging. The prosecutor's representations were therefore reasonable inferences drawn from the evidence presented at trial and do not rise to the level of prosecutorial misconduct.

iii. Ammunition Purchase at Walmart

The prosecutor also summarized evidence that Petitioner may have purchased ammunition used in the offense at Walmart. Surveillance photographs were introduced at trial showing Petitioner and the victim entering and leaving the store. *Id.* at 1489. A receipt also showed ammunition was purchased during the time they were in the store. *Id.* at 1045–46. The victim likewise testified that they purchased ammunition that day, although there was no photo or video of them purchasing the ammunition. During closing arguments, the prosecutor interpreted this circumstantial evidence as direct proof that the Petitioner had purchased ammunition:

> The purchase of the bullets, she said she told Detective Hiticase right after she got done buying the gun, they went to a Wal-Mart and bought bullets. Detective Hiticase then went and followed up on it, and you heard from the Wal-Mart security officer that came in and said, yeah, I was given a date and

> time and I was able to narrow it down to a transaction around that time, and lo and behold we have a picture, and we have the security footage of the defendant and [redacted] buying the ammunition. So what [redacted] said is also, again, corroborated.

Id. at 1499. Trial Counsel did not object to the prosecutor's characterization of the Walmart footage. Although the surveillance footage did not specifically depict the sale, the prosecutor argued that the video shows Petitioner entering the store to purchase ammunition. Given the victim's testimony to this effect, and the receipt demonstrating that ammunition was purchased while the Petitioner was in the store, this was reasonable inference from the evidence presented to the jury. It does not rise to the level of prosecutorial misconduct.

b. Denigration of Defense Counsel

Prosecutors may not attack "the integrity of defense counsel" during closing arguments. *United States v. Nobari*, 574 F.3d 1065, 1079 (9th Cir. 2009). They may, however, undermine "the strength of the defense on the merits." *Id.* Courts thus distinguish between comments referring to the defense's argument and statements which amount to an ad hominem attack on defense counsel. *United States v. Ruiz*, 710 F.3d 1077, 1086 (9th Cir. 2013) ("[T]he prosecutor's characterization of the defense's case as "smoke and mirrors" was not misconduct.").

Here, trial counsel objected to the prosecutor's comments on the defense. The statements, however, did not amount to personal attacks on defense counsel. The prosecutor asserted that defense counsel's arguments were a "red herring," "smoke and mirrors," and amounted to not presenting a defense. (Doc. 23-1 at 1529, 1531.) He also alleged that the arguments amounted to a plea to "just throw [evidence] out because it hurts my client" and represented "a common tactic to always attack the victim in a case." *Id.* at 1497, 1535. In perhaps the most personal attack, the prosecutor speculated about defense counsel's motive: "He's doing it because he's representing his client, of course. But what's the defense? There wasn't any." *Id.* at 1529. Because these statements attack the veracity of the defense, rather than defense counsel personally, they do not amount to denigration

of defense counsel. *See Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998) ("Calling an argument on [the petitioner's] behalf 'trash' cannot be characterized as improper. He did not say the man was 'trash'; he said the argument was. A lawyer is entitled to characterize an argument with an epithet as well as a rebuttal."). The Ninth Circuit has found that several similar statements, even those implying misdirection from the defense, did not amount to misconduct. *See United States v. Palomo*, 714 F. App'x. 799, 800 (9th Cir. 2018) ("[T]he Government did not commit misconduct during rebuttal closing argument by describing a defense tactic as a 'shell game[;]'. . . criticizing defense tactics is fair game during closing, and this type of argument is generally considered 'well within normal bounds of advocacy.'"); *United States v. Salas*, 669 F. App'x. 449, 450 (9th Cir. 2016) (finding the prosecutor did not commit misconduct by calling defense's focus on sequence of events a "classic lawyer thing" designed to "muddy up the water" and show the jury a "red herring"). The comments thus do not amount to prosecutorial misconduct.

4. Statements at Trial Where the Prosecutor Engaged in Misconduct

a. Celene Bensink

As no party objected to the account of Celene Bensink's testimony set forth in the R&R, the Court adopts the description as set forth therein:

> Celene's testimony was consistent regarding her account of what she observed of the shooting incident on January 31st. (Doc. 23-1 at 656-702.) She was in her bedroom on the second floor of the house facing Cheryl Drive at 9:00 pm, when she heard an argument coming from the street. (Id. at 657-68.) When she went to the window, she observed a vehicle parked on the street in front of her house and heard an argument between a man and a woman. (Id.) She heard the man's voice growing loader (sic) and it sounded like he was yelling for the woman to get back into the vehicle. (Id.) It was dark, so Celene was unable to make out the model of the car, but described it as dark, "almost [] black" and "looking almost like a Mustang Coupe." (Id. at 658-61.) She did not see the woman, but testified that she thought the girl may have been located outside the car, perhaps hiding in bushes in the shadow of a brick fence. (Id. at 670-71.) She could not see the person in the vehicle either, but soon after going to the window she heard gunshots, "three "blue flashes" of gunfire, that she believed were fired in her direction. (Id. at 661-63.) At the same time, Celene determined that the man in the car was in the driver's seat, with his firing arm extended out the window. (Id. at 661-

> 63, 681) Celene immediately dropped to the floor to shield a young child and her dog from the gunfire. (Id. at 695-96.) She waited a few minutes after the gunfire, and then called 911. Celene did not see anything that happened after that, although she heard the car speed away. (Id.)
>
> The victim's testimony regarding this event differed from Celene's account in some important respects. She testified that on January 31st, she was with Petitioner in his car and were on their way home when they turned into the neighborhood of Cheryl Street, where she lived. (Doc. 11-2 at 236-41.) They were arguing before they parked the car on Cheryl Street, and after the car was parked, both of them got out of the car and continued to argue for about 5 to 10 minutes on the sidewalk. (Id. at 242-44.) She testified that Petitioner did not want her to go to her house, and then "started shooting in the air to kind of get [her] attention to listen to what he [] wanted." (Id. at [245-46].) They then got back into the car and took off again. (Id.)
>
> In his closing statement, the prosecutor emphasized several times that Celene's testimony corroborated the victim's. He stated that "Celene [] watched the whole thing go [], and watched as the defendant shot up the neighborhood." (Doc. 23-1 at 1486-87.)

(Doc. 35 at 23–25.) The prosecutor repeatedly emphasized that Celene witnessed the entire event:

> You know that Celene watched the whole thing. You have two eyewitnesses saying that man shot at the house. . . . You heard that from Celene who watched it all happen. You heard the same story from [redacted] of what happened out there.

(Doc. 23-1 at 1489–90.) He went on:

> "Celene, already told you, was the one who watched it all go down. All their stories jive." (Doc. 23-1 at 1500.) In addressing the proof that it was Petitioner who did the shooting, the prosecutor stated that the victim, Celene and all eyewitnesses saw his car drive away. (Id. at 1501-1502.) "Celene sees it all happening, says exactly the same thing [the victim] says happens." (Id.) The prosecutor then added that "Celene was watching the whole thing happen, and Celene knew that she wasn't really going to get shot because she's watching him shoot in a different direction, near her, but towards this house. She's not in fear because she knows what's going on, that she's not going to be getting shot at that point." (Id. at 1509.)

(Doc. 35 at 23–25.)

The prosecutor overstated the strength of Celene's testimony to the extent he implied she identified the Petitioner. Celene never testified that she could see the shooter

clearly or that she had witnessed the entire incident. Rather, she explained that she was unable to see the Petitioner in the dark, and that, after hearing gunshots, she ducked down and did not see the vehicle drive away. She also provided a description of the vehicle based on her observation before shots were fired, stating that it appeared to be a dark-colored small vehicle which resembled a Mustang coupe. (Doc. 23-1 at 661.) The prosecutor's statements reach beyond Celene's testimony. Indeed, although Respondents suggest that the prosecutor also acknowledged that Celene did not witness the entire event or directly identify the Petitioner, the Court finds no such statement in the cited portion of the testimony. *Id.* at 1489–90. The prosecutor asserted only that Celene had no prejudice against Petitioner because "[s]he doesn't even know him." *Id.* at 1489.

The prosecutor's overstatements, however, do not establish reversible error. Trial counsel did not object to the prosecutor's statements about Celene's testimony. For a misrepresentation to be reversible, a prosecutor's misconduct must be so egregious that it infects the trial with such unfairness as to constitute a denial of due process before it violates the Fourteenth Amendment to the federal Constitution. *Donnelley v. DeChristoforo*, 416 U.S. 637, 643 (1974). The prosecutor's statements about Celene's testimony were not significant enough to render Petitioner's trial fundamentally unfair. Because the State had already presented evidence that the victim's testimony was corroborated, the prosecutor did not address any material issue not already within the jury's knowledge. Moreover, instructing the jury that lawyers' comments and argument are not evidence can cure the harmful effect of isolated instances of improper argument. *Sassounian v. Roe*, 230 F.3d 1097, 1106–07 (9th Cir. 2000). As the Court gave such an instruction here, the prosecutor's conduct was not reversible error.

b. Vouching

"Improper vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity or suggesting that information not presented to the jury supports the witness's testimony." *United States v. Flores*, 802 F.3d 1028, 1040 (9th Cir. 2015). Petitioner asserts that the prosecutor vouched

for both the victim's and Detective Hiticas' testimony.

i. The Victim's Testimony

Here, the Prosecutor improperly vouched for the truthfulness of the victim. In his closing argument, he advised the jury:

> So, let's look at the credibility of [the victim], because we know maybe she's not the greatest high school female out there right now, but the one thing -- she might not be the ideal homecoming queen or something like that in high school, but the one thing that she isn't, she isn't a liar.

(Doc. 23-1 at 1497–98.) Later in his argument he stated again: "She may be an interesting individual, but she's not a liar." *Id.* at 1501.

These assurances of the victim's truthfulness were improper vouching. The Ninth Circuit has found similar affirmations improper, regardless of whether the prosecutor purported to express opinion or fact regarding the truthfulness of the victim. In *Carriger v. Stewart*, for example, the court found a prosecutor's statements that a witness "is not a liar" and "is a lot of things but he is not a liar" were improper vouching. 132 F.3d 463, 482 (9th Cir. 1997); *see United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (finding prosecutor's statements "I think he was very candid," and "I think he was honest" to be improper vouching for witness's credibility). The prosecutor thus improperly vouched for the veracity of the victim's testimony in his closing argument.

ii. Detective Hiticas' Testimony

The prosecutor also summarized Detective Hiticas' testimony. During closing arguments, he stated:

> But where's the gun, you may ask? The police looked for it. Detective Hiticase, just yesterday, or two days ago, testified they tried to track it down. They went knocking on doors, calling the phone numbers found on the phone, on the defendant's phone. No ones going to talk to them. Why? Why do you think any of these individuals are not going to talk to a detective about a gun they just bought, probably pretty cheap, on the street, from a guy you probably know, who probably went and told them what he did with it. They know that gun's hot. They know that it's got something on it. That's why they're buying it off the street for a couple hundred bucks. They're not going to talk to police.

(Doc. 23-1 at 1495.)

Earlier in the trial, the detective testified that he looked for the weapon used in the offense but was unable to locate it. *Id.* at 1378. A text message from Petitioner's phone, which the officer testified referred to selling a weapon, was also admitted. *Id.* In his closing argument, the prosecutor is clearly speculating about what the Petitioner may have said when selling the gun that would have contributed to the reluctance of purchasers to identify the seller when the detective sought to locate the weapon. "Why do you think any of these individuals are not going to talk to a detective about a gun they just bought, probably pretty cheap, on the street, from a guy you probably know, who probably went and told them what he did with it." Although, the prosecutor's speculation reaches beyond the evidence, it is speculative argument. These speculations are an argumentative attempt to bolster the Detective's conclusion that the Petitioner possessed the weapon and sold it. But in light of the evidence admitted about the Petitioner selling a weapon, they do not amount to reversible error.

iii. Whether Vouching was Reversible Error

"There is 'no bright-line rule about when vouching will result in reversal.'" *Ruiz*, 710 F.3d at 1085 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1278 (9th Cir. 1993)). Courts consider several factors, including form, specificity, timing, the extent that the statement implies extrajudicial knowledge, degree of personal opinion asserted, the importance of the witness' testimony, and the form and timing of a curative instruction. *Id.* Trial counsel did not object to either instance of vouching.

When addressing comments on truthfulness, the Ninth Circuit has found that general instructions can cure vouching. For example, in a case of "mild" vouching, such as a simple assurance that a witness "is telling the truth," a general instruction at the end of a case may cure potential prejudice. *Necoechea*, 986 F.2d at 1280; *see United States v. Shaw*, 829 F.2d 714, 718 (9th Cir. 1987) (finding that a general instruction that the testimony of a recipient of a beneficiary plea agreement should be examined with caution cured any potential prejudice). As the prosecutor here twice asserted that the victim was not a liar, without further insinuation that he had special knowledge or power over her honesty, the trial

court's general instruction to the jury that closing arguments are not evidence was sufficient to cure any mild vouching.

The Ninth Circuit's multi-factor approach to vouching also demonstrates that the prosecutor's statements about Detective Hiticas' testimony were not fundamental error. The Court issued a general instruction that the closing arguments were not evidence, the statement did not explicitly express personal opinion, and the prosecutor's statements about the fate of the weapon were not repeated. Though repeated misrepresentation of evidence can demonstrate prejudice, generally, an isolated passage in an attorney's argument will not. *Donnelly,* 416 U.S. at 646. The vouching was thus not reversible error.

c. Burden Shifting

"It is well established that the privilege against self-incrimination prohibits a prosecutor from commenting on a defendant's failure to testify." *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988). A prosecutor comments on a defendant's silence when a statement is "manifestly intended to call attention to the defendant's failure to testify, or of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *Lincoln v. Sunn*, 807 F.2d 805, 809–10 & n.1 (9th Cir. 1987) (prosecutor's statement that "there's only one person who could testify" was a comment on defendant's silence).

However, "[t]here is a distinction between a comment on the defendant's failure to present exculpatory evidence as opposed to a comment on the defendant's failure to testify." *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995). "[A] comment on the failure of the defense as opposed to the defendant to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege." *United States v. Wasserteil,* 641 F.2d 704, 709–10 (9th Cir. 1981) (quoting *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir. 1977)). Thus, to run afoul of the Fifth Amendment, a comment must contain "clear signals that the defendant himself, rather than the defense generally, was being discussed." *United States v. Mayans,* 17 F.3d 1174, 1185 (9th Cir. 1994). This standard of specificity is satisfied when a prosecutor

comments on a lack of contradictory testimony in a case where the only person who could provide such evidence is the defendant. *See United States v. Preston*, 873 F.3d 829, 843 (9th Cir. 2017) ("[I]t was plain error for the prosecutor to state that 'there's no testimony in this case that contradicts [the victim's] testimony,' because the jury would have immediately inferred that they did not hear testimony from [the defendant,] the only witness who could have directly contradicted [the victim's] allegations.").

Petitioner asserts several statements during closing arguments rose to the level of inappropriate comment on his silence. First, when introducing a theme that the evidence was undisputed, the prosecutor stated:

> He's guilty of all of these counts, ladies and gentlemen. He's guilty of all the charges. And at the end of the day, when you look at the State's case, and you look at all the evidence, the defendant doesn't have a burden at all, he doesn't have to present any evidence, and that's clear in your jury instructions. And that's what happened here in this case. But what also that tells you is that everything that the State put in front of you is undisputed. All the evidence that came from that stand, all the physical evidence, the pictures, the tangible items, the casings, all of that is undisputed. No one took that stand and said anything different than what [redacted] told you and what I told you in the opening statement what happened. The State's case is undisputed on what happened.

(Doc. 23-1 at 1511–12.) As the prosecutor continued in this vein, the court sustained defense objections:

> MR. RADEMACHER: Defense counsel got up here in his opening and talked to you about he takes issue with the State saying that its case is undisputed. Well, really what it is is his client takes issue with accepting responsibility. He takes issue with he's being prosecuted for a crime. Because what's undisputed here is what came from that stand, from the witnesses. No one came in here and disputed anything [redacted] told you. No one came in here and disputed anything any of the police officers told you. No one came in here and disputed anything any of the other civilian victims, our innocent victims told you.
>
> MR. CARTER: Judge, I'm going to object to improper argument. It's burden shifting. Period.
>
> THE COURT: Mr. Rademacher, I'm going to sustain that objection. I think there are different ways you can argue your point. But, ladies and gentlemen, the defense, as you know from the instructions, is not required to produce

> any evidence, they're not, and that's in your instructions and that's clear. Whether or not any of the evidence that was present was disputed is up to you to determine based upon all the information that you receive, and counsel obviously have different opinions about that. With that, I'm going to ask Mr. Rademacher to proceed, please.
>
> MR. RADEMACHER: What evidence contradicted what [redacted] told you happened?
>
> MR. CARTER: Same objection, Judge.
>
> MR. RADEMACHER: Talking about the evidence, Your Honor.
>
> THE COURT: I'm going to overrule in this instance. Go ahead.

Id. at 1527–28.

These statements amount to inappropriate comment on Petitioner's silence. In a crime where only the victim identified Petitioner, the prosecutor repeatedly emphasized the lack of testimony disputing the victim's account. This was tantamount to referring to Petitioner's failure to testify and improperly shifted the burden to the Petitioner. *See Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006) ("The prosecutor's statement that '[t]here's nothing different naturally and necessarily implicates [Defendant's] decision not to testify, as [Defendant] is the only person who could definitively answer the question of whether he used a knife.").

In response to the prosecutor's burden-shifting, trial counsel did timely object. However, even had he not done so, Ninth Circuit precedent still demonstrates that even where a prosecutor's burden-shifting statements during closing argument are improper, they are rendered harmless if a trial court responds with specific instruction to the jury. *See United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001). Here, in response to trial counsel's objection, the trial court issued a specific curative instruction regarding the prosecution's burden:

> [L]adies and gentlemen, the defense, as you know from the instructions, is not required to produce any evidence, they're not, and that's in your instruction and that's clear. Whether or not any of the evidence that was present is disputed is up to you to determine based on all the information that

you receive, and counsel obviously have different opinions about that.

(Doc. 23-1 at 1528.) In evaluating whether the trial court's conclusion in the Rule 32 proceeding that Petitioner received a fair trial and effective assistance of counsel at trial, this instruction, issued pursuant to the Defense Counsel's objection and along with the other evidence presented at trial, was a sufficient basis on which the trial court may have appropriately concluded that the Defendant received a fair trial without violating clearly established federal law. In fact, because the wrong was cured by the trial court's curative instruction, to prevail Petitioner must establish, not just that prosecutorial misconduct occurred, but that the trial court's responses to that conduct, be it the curative instruction or its other responses to objections, were in error. Plaintiff makes no such showing.

5. Cumulative Wrongs

Because each instance of misconduct did not alone rise to the level of reversible error, they do not constitute violations of clearly established federal law. The R&R also considered, however, whether, taken together, the wrongs constitute a cumulative harm which was a violation of clearly established federal law. "[C]umulative error warrants habeas relief only where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In simpler terms, where the combined effect of individually harmless errors renders a criminal defense 'far less persuasive that it might [otherwise] have been,' the resulting conviction violates due process." Nevertheless, this, too, is an issue upon which the PCR court ruled on the merits finding no prejudice arising from any prosecutorial misconduct and finding no ineffective assistance of counsel and no prejudice arising from such ineffective assistance.

In fact, although the Ninth Circuit in *Parle* found that it is "clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair," *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (citing *Donnelly*, 416 U.S. at 643);[2] *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973),

[2] Although circuit courts are split on the issue, the Ninth Circuit reasoned that *Donnelly* clearly established that cumulative error analysis applies to due process violations. *Id.*; Ruth A. Moyer, *To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May*

"the fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense 'far less persuasive,' and thereby had a 'substantial and injurious effect or influence.'" *Parle*, 505 F.3d at 928 (internal citations omitted). The court specified that an allegation of cumulative error is strongest where several errors undermine an already weak element of the state's case. *Id.* That is not the case here. Each error explained above goes to elements of the offense supported by other, properly argued, evidence. The only error which relates to an element the defense argued was unsupported, is the representation of Celene Bensink's testimony to suggest that she identified the Petitioner. Even to the extent that the representation occurred, however, the Petitioner was also identified via the testimony of the victim, the text messages between the victim and the Petitioner, and the contents of the Petitioner's vehicle when he was apprehended. Having reviewed all of the instances of such conduct complained of above, this Court cannot find that the state court's PCR determination on these issues was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. "[H]abeas 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).

6. Ineffective Assistance of Trial Counsel

To prevail on an ineffective assistance claim, the party seeking relief must show (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

In his PCR Petition, Petitioner raised ineffective assistance of his trial counsel. The

Cumulatively Assess Strickland Errors, 61 Drake L. Rev. 447, 475 (2013) ("[T]he Supreme Court has not yet rendered cumulative analysis of an attorney's errors to determine *Strickland* prejudice as clearly established federal law."). Regardless, because Petitioner cannot establish that cumulative error occurred, he cannot succeed on the substance of his claim.

trial court concluded that "defense counsel's performance did not fall below prevailing professional norms and that no deficient performance on the part of defense counsel prejudiced Mr. Rodriguez's defense or rendered different trial results." (Doc. 1 at 28.) As explained above, this finding is entitled to deference; the Court may only reverse the state court's finding on the merits if it was a violation of clearly established federal law. The Court's review of the Petitioner's allegations of prosecutorial misconduct establishes that no such violation occurred. First, although the prosecutor engaged in burden shifting during closing arguments, trial counsel successfully objected to the statements and received a curative instruction. To the extent that Petitioner maintains he was prejudiced, he therefore alleges error by the trial court, not trial counsel. Moreover, as explained above, of the three remaining instances of misconduct, none constituted reversible error pursuant to clearly established federal law. Indeed, none are particularly egregious to notions of a fair trial, or, when combined with curative instructions, sufficiently egregious so that the trial court's evaluation meets the standard required for habeas relief. Petitioner thus cannot prove, under a standard deferential to the state's findings, that the result of the proceeding would have been different but for counsel's errors. The trial court's ruling on the PCR petition was therefore not a violation of clearly established law.

As a result, the trial court's finding that trial counsel's performance did not prejudice Petitioner undermines the merits of his prosecutorial misconduct and IAAC claims. The trial court's finding that counsel's failure to object to the prosecutor's statements was non-prejudicial to the Petitioner's defense must stand. This finding therefore controls this Court's analysis on his other claims.

7. IAAC

Like ineffective assistance of trial counsel, Courts review claims of IAAC according to the standard set out in *Strickland*. A petitioner must show that (1) appellate counsel's advice fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, he would have prevailed on appeal. *Strickland*, 466 U.S. at 687.

First, there is a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Id.* at 687. Indeed, "[i]n many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; . . . the weeding out of weaker issues is widely recognized as one of the hallmarks of effective advocacy." *Miller*, 882 F.2d at 1433. As a result, where counsel has filed a merits brief, it is difficult to demonstrate incompetence. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Nonetheless, "it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim." *Id.* Where ignored issues are clearly stronger than those presented, for example, the presumption of effective assistance can be overcome. *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

Second, the salient question in analyzing a claim of ineffective assistance of appellate counsel is whether the unraised issue, if raised, would have "led to a reasonable probability of reversal." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). Thus, where a petitioner alleges that failure to a raise claim on appeal constitutes ineffective assistance, a finding of prejudice is a function of the strength of the underlying unraised claim. Where the underlying claim was unlikely to lead to a successful appeal, it cannot be the basis of a successful IAAC claim.

Here, none of the prosecutor's violations demonstrate that Petitioner's appellate counsel violated the *Strickland* standard by failing to raise prosecutorial misconduct on appeal. On direct appeal, counsel raised only the issue of suppression of an allegedly unconstitutional search. In a letter to Petitioner, counsel explained:

> As a strategic matter, I did not end up filing on the issue regarding juror taint or closing arguments we spoke about. The case law I found did not support the arguments. Because I didn't want to weaken your best argument with weak points, I elected to focus entirely on the suppression issue.
>
> Although it's a long shot, I hope we can get your case reversed.

(Doc. 29-1 at 114.) As explained above, of the four instances of misconduct, trial counsel objected to only burden-shifting. Under Arizona law, "[o]pposing counsel must timely

object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error." *State v. Smith*, 138 Ariz. 79, 83, 673 P.2d 17, 21 (1983). Thus, to successfully appeal where counsel fails to object during trial, a defendant must prove that the unobjected to event was so prejudicial that the Defendant was denied a fair trial. *Id.*; *see State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978).

This standard, and Counsel's explanation, demonstrate that the failure to raise prosecutorial misconduct on direct appeal was a strategic decision entitled to deference. Indeed, the standards that apply to each instance of misconduct demonstrate that declining to raise the issues on direct appeal was not a violation of clearly established federal law. The Court is aware of no Supreme Court authority finding otherwise. In fact, the trial court's finding that trial counsel's performance did not prejudice Petitioner necessarily reflects on the merits of Petitioner's IAAC claim. The unobjected-to misconduct cannot establish prejudice for failure to raise the same claims on appeal. Thus, because appellate counsel's decision not to raise prosecutorial misconduct was not in violation of a clearly established federal law, neither Petitioner's IAAC claim nor his prosecutorial misconduct claim warrant habeas relief.

III. Order to Show Cause

In the R&R, the Magistrate Judge recommends "that Respondents be required to show cause as to why sanctions should not be imposed for their mishandling and misrepresenting of the record." (Doc. 35 at 40.) This recommendation was based on Respondents' numerous failures to clearly communicate with the Court and accurately represent the record in this matter. Most significant among these deficiencies was Respondents' failure to provide a complete record to the Magistrate Judge. In their initial Answer, Respondents filed a copy of the Petitioner's PCR petition that omitted the exhibits originally attached to the petition. (Doc. 11.) The Magistrate Judge directed respondents to file "the exhibits Petitioner indicates were attached to his PCR Petition." (Doc. 20.) Although Respondents assert in their Supplemental Answer that the attached exhibits

included the PCR exhibits ordered to be disclosed, they attached the wrong documents to the filing. (Doc 23.) After this failure was highlighted by Petitioner, Respondents initially misinterpreted the deficiency and filed a Notice regarding independently obtaining each exhibit referenced by Petitioner in his PCR petition. *See* (Doc. 36 at 7.) Ultimately, Respondents conceded that they had mistakenly attached the wrong documents and provided the correct exhibits to the court. (Doc. 29.)

The omission was an unprofessional error with the potential to prejudice the Petitioner. Petitioner repeatedly cites to the exhibits in his PCR petition and the Magistrate Judge explicitly requested that the omitted documents be filed. Respondents, however, even after failing for a second time to produce the attachments, continued to obfuscate the issue with notices regarding their efforts to obtain the trial exhibits referenced by Petitioner, rather than produce the requested attachments to his PCR petition. *See* (Doc. 36 at 7.) Significantly, the sought PCR attachments were relevant to the disposition of the Petitioner's claim. Respondents argued that Petitioner's limited references to prosecutorial misconduct in the PCR petition failed to raise the issue on appeal. (Doc. 23 at 2.) Petitioner asserted, however, that the attachments to his petition, which were repeatedly cited, also included an annotated transcript of the prosecution's closing argument which clearly identified instances of misconduct. (Doc. 28 at 2.) As the Respondents' arguments about the specificity of Petitioner's briefing are clearly undermined by the documents they repeatedly failed to produce to the Court, Respondents are ordered to show cause for why they should not be sanctioned for their failures to comply with the magistrate judge's orders.

CONCLUSION

For the reasons set forth above, Petitioner's Petition for Writ of Habeas Corpus is denied.

IT IS THEREFORE ORDERED that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is **DENIED.**

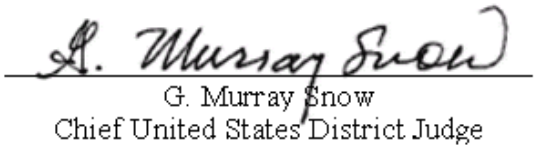
IT IS FURTHER ORDERED that the Court **ADOPTS** in part and **DECLINES**

to adopt in part the Report and Recommendation. (Doc. 35.)

IT IS FURTHER ORDERED that Respondents are ordered to show cause for why they should not be sanctioned for their failure to produce a complete record in this case within **14 days** of the filing of this order.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court issues a Certificate of Appealability limited only to Petitioner's claim that ineffective assistance of appellate counsel violates a clearly established federal law and establishes cause for procedural default.

Dated this 17th day of May, 2021.



G. Murray Snow
Chief United States District Judge

APPENDIX C

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Daniel Alexander Rodriguez,

Petitioner,

v.

Stephen Morris, et al.,

Respondents.

No. CV-19-04957-PHX-DLR (MHB)

REPORT AND RECOMMENDATION

TO THE HONORABLE DOUGLAS L. RAYES, UNITED STATES DISTRICT COURT:

On August 13, 2019, Petitioner Daniel Alexander Rodriguez, who is confined in the Arizona State Prison, Eyman - Running Unit, Florence, Arizona, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (hereinafter "habeas petition"). (Doc. 1.) On February 13, 2020, Respondents filed an Answer (Doc. 11). On March 23, 2020, Petitioner filed a Reply (Doc. 14). Subsequently, this Court ordered further briefing and appointed counsel. On July 17, 2020, Respondents filed a Sur-Reply (doc. 18), and on August 5, 2020, a Supplemental Answer (doc. 23). On September 29, 2020, Petitioner, through counsel, filed a Sur-Reply Regarding Prosecutorial Misconduct. (Doc. 28.)

STATE PROCEDURAL BACKGROUND

Petitioner was indicted by an Arizona Grand Jury on February 24, 2014, on fourteen separate felony counts: two counts of Discharge of a Firearm at a Structure, class 2 dangerous felonies (counts one and eleven); four counts of Aggravated Assault, class 3 dangerous felonies (counts two, three, twelve and thirteen); one count of Aggravated

Assault, a class 3 dangerous felony and a domestic violence offense (count fourteen); four counts of Disorderly Conduct, class 6 dangerous felonies (counts four through seven); one count Misconduct Involving Weapons, a class 4 felony (count eight); one count Forgery, a class 4 felony (count nine); and one count Taking Identity of Another, a class 4 felony (count ten). (Doc. 11, Exh. A.) Counts one through seven related to a shooting incident that occurred on January 31, 2014; and counts eleven through fourteen related to a shooting incident that occurred on February 14, 2014. (Id.)

Petitioner proceeded to trial, and was convicted of the lesser-included offense of Discharge of a Firearm at a non-residential structure (count one), the lesser-included offense of Disorderly Conduct (counts two and three), and as charged on the remaining counts.[1] (Id., Exhs. L, N.) The jury further found counts one through seven, and ten through thirteen to be dangerous offenses. (Id.) On January 23, 2015, Petitioner was sentenced as a repetitive offender with two prior felony convictions to a total of 42.76 years in prison. (Id., Exh. N.)

Petitioner appealed his judgment and sentence, and the Arizona Court of Appeals, in affirming, set forth the following factual background:

> ¶ 2 A grand jury indicted defendant on a fourteen felony counts stemming from his behavior in several 2014 incidents. The first incident occurred during a fight between defendant and his then 16 year-old former girlfriend (A.G.). The two were riding in defendant's burgundy Mercury Montego when victim fled the vehicle. Defendant screamed at her repeatedly to get back in the car. Eventually defendant pulled a 9mm weapon out and shot multiple times in her general direction to get her "attention." Witnesses heard A.G. crying hysterically "let me just go home," heard the defendant yelling at her, heard the gun shots and heard his car speeding off. A.G. testified she was scared and had gotten back in the car. One of the witnesses found three bullet holes in and around his house. Two 9mm shell casings were found at the scene. This event is the factual basis for Counts 1-7.
>
> ¶ 3 Counts 8 and 9 involve defendant using the identification of his brother N.R. Count 8 results from defendant presenting the false identification to an officer when that officer came into contact with defendant and A.G. during a loud fight in

[1] Because count eight was not submitted to the jury, and was later dismissed, counts nine through fourteen were renumbered as eight through thirteen.

> a parking lot days after the first shooting event. Count 9 results from defendant presenting N.R.'s identification to purchase the 9mm gun from a pawnshop. [Evidence showed that defendant used his brother's identification to buy both the 9mm gun and the burgundy Montego, as well as 9mm ammunition.] The false identification was found in defendant's vehicle and A.G. was present both times it was used.
>
> ¶ 4 A couple of weeks after the first shooting, victim attempted to break up with defendant. Defendant texted her numerous threatening messages over two days. Those texts, as testified to and as recovered in defendant's phone, included: "tell your momma not to sleep on the couch cuz a bullet might hit her" and "Be ready ... I got 83 rounds" and "we both gonna die." [] A terrified A.G. called the police. Defendant then called A.G. and asked her to come outside, she refused; ten minutes later defendant fired multiple gunshots at her house. Approximately eight bullets travelled into the interior of A.G.'s house. A.G. provided police with a detailed description of defendant's car, including his license plate number, and advised them that defendant had a gun he'd recently purchased under a driver's license in N.R.'s name. This second shooting event is the basis for Counts 11-14.
>
> ¶ 5 After an active search for defendant, which included him driving from location to location, he was arrested later that same day while getting into his vehicle. He was taken into custody from the driver's seat. A protective sweep of the car was done at that time; officers knew that defendant was the suspect in a crime involving a gun and was potentially armed. The vehicle was then towed to the police substation while officers waited for a search warrant to issue. Police searched the vehicle pursuant to a search warrant in the early morning hours at the police substation. Inside the car officers found a 9mm bullet, two bullet shell casings, the sales receipt for the 9mm gun, and a cell phone containing the threatening texts. One shell casing and one live round were on the floor of the vehicle; another shell casing was in the trunk. Police testified that the shell in the interior of the vehicle was lodged under the carpet and took some rooting around to find.

(Doc. 11, Exh. S.)

In Petitioner's opening brief in the Arizona Court of Appeals, he raised the following issues: (1) unlawful search and seizure of Petitioner's vehicle after his arrest, and (2) the trial court improperly shifted the burden of proof onto Petitioner during the suppression hearing. (Id., Exh. P.) On March 15, 2016, the appellate court affirmed Petitioner's convictions and sentences, finding no error in the trial court's denial of his motion to suppress. (Id., Exh. S.) Petitioner filed a petition for review in the Arizona Supreme Court, claiming that the lower court erred in denying his claims regarding the

search and seizure of his vehicle. (Id., Exh. T.) The Arizona Supreme Court summarily denied review on September 15, 2016. (Id., Exh. U.)

On February 18, 2016, Petitioner filed a pro se notice of post-conviction relief ("PCR"), which his counsel moved to dismiss without prejudice as Petitioner's direct appeal was still pending. (Doc. 11, Exhs. V, X.) The trial court granted the motion. (Id., Exh. Y.) After the conclusion of direct review, on September 18, 2016, Petitioner filed a pro se notice of PCR, indicating that he was raising a claim of ineffective assistance of counsel ("IAC"), and was not requesting the appointment of counsel to represent him. (Id., Exh. X.) The trial court set a briefing schedule. (Id., Exh. AA.) Pursuant to a subsequent request by Petitioner, the trial court appointed advisory counsel to assist him. (Id., Exh. BB.) On November 14, 2016, Petitioner filed his PCR petition, raising the following claims:

A.) IAC: trial counsel.

1. Trial counsel's failure to object to prosecutor's improper voir dire question identifying one of the victims as a child.

2. Trial counsel's failure to object to the introduction of text messages.

3. Trial counsel's making prejudicial statements in front of the jury and failing to move for a mistrial.

4. Trial counsel's failure to impeach a law enforcement witness as to the suggestiveness of a photo line-up.

5. Trial counsel's failure to object to the prosecution's laptop being provided to the jury.

B.) Prosecutorial misconduct, by making improper remarks during voir dire, using "staged" testimony to introduce inadmissible evidence, and making improper statements to inflame the passions of the jury.

C.) Trial judge's abuse of discretion.

1. Trial court abused its discretion by not investigating jury panel for bias.

2. Trial court abused its discretion by overruling multiple hearsay objections by Petitioner's counsel.

3. Trial court abused its discretion by not declaring a mistrial after prosecutor made improper argument in closing statements.

4. The trial court was without jurisdiction to render judgment on count 10, as it did not allege the place of the continuing offense in count.

D.) IAC: appellate counsel - for not raising all of the above claims.

(Id., Exh. CC.)

The trial court denied Petitioner PCR relief, reasoning as follows:

> The defendant failed to raise his claims of prosecutorial misconduct and abuse of discretion by the trial court in his direct appeal. Further, based on the allegations in the PCR request, the Court finds that defense counsel's performance did not fall below prevailing professional norms and that no deficient performance on the part of defense counsel prejudiced Mr. Rodriguez's defense or rendered different trial results than would have been achieved through competent performance. The Court also does not find that Defendant has stated a colorable claim for abuse of discretion by the trial court. As to one specific issue raised in that regard, the court reporter recently filed an Affidavit of Correction indicating that a statement that had been attributed in the trial transcript to defense counsel was, in fact, defendant's statement. The correction makes clear why the Court did not address the defense attorney for making such comment, since the comment was not made by him. Accordingly, and for the other reasons stated in the State's response [it is ordered denying PCR relief].

(Doc. 11, Exh. FF.)

Petitioner filed a petition for review of that decision in the Arizona Court of Appeals. (Id., Exh. GG.) On January 4, 2018, the Court of Appeals granted review, but denied relief, holding that Petitioner had failed to meet his burden to show that the trial court abused its discretion in its denial of PCR relief. (Id., Exh. II.) Petitioner subsequently filed a petition for review of the appellate court decision in the Arizona Supreme Court. (Doc. 1 at 36-209.) The Arizona Supreme Court summarily denied review on August 24, 2018. (Id. at 211.)

Petitioner filed his habeas petition on August 13, 2019. In his petition, Petitioner asserts the following claims: (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, and (3) prosecutorial misconduct. (Doc. 1.) Respondents assert that Petitioner's petition is untimely, and in any event, his prosecutorial misconduct claim is procedurally defaulted, and his IAC claims lack merit. (Doc. 11.)

With respect to Respondents' claim that Petitioner's habeas petition was untimely, a brief discussion of the procedural history is merited. Respondents claimed in their Answer that Petitioner's habeas petition was untimely, because the calculation of the

statute of limitation period began upon the Arizona Court of Appeals' denial of Petitioner's petition for review, and more than one year from that date elapsed before Petitioner filed his habeas petition. (Doc. 11 at 9, 13.) Petitioner, however, in his PCR petition stated that he **had** filed a petition for review of that denial in the Arizona Supreme Court, and attached to his habeas petition a copy of the petition, as well as a copy of the Arizona Supreme Court's order denying review. (Doc. 1 at 34-210, 211.) The time period that his petition was pending in the Arizona Supreme Court would have tolled the statute of limitations, and thus rendered his habeas petition timely.

Respondents attached to their Answer a copy of the Arizona Court of Appeal's ruling on Petitioner's petition for review, filed under case number 1 CA-CR 17-0162. (Doc. 11-2 at 86, Exh. II). That is the same case number on the Arizona Supreme Court order denying review that Petitioner attaches to his habeas petition. (Doc. 1 at 211.) The case number associated with Petitioner's case on direct review is 1 CA-CR 15-0070. Thus, although Respondents attached a copy of the Arizona Supreme Court docket, that docket related to direct review. (Doc. 11-2 at 135, Exh. QQ.) In their Answer, Respondents failed to acknowledge Petitioner's claim regarding the Arizona Supreme Court filings. Noting the discrepancy, this Court issued an Order directing Respondents to address this failure. (Doc. 17.)

In their response to that Order, Respondents withdrew their statute of limitations defense, asserting that they had based their argument on documents received from the Arizona Supreme Court Clerk's Office before the filing of their Answer. (Doc. 18.) Upon receipt of this Court's Order, they re-contacted that Office and received "the documents [Petitioner] relies on in his timeliness argument." (Id. at 2.) Although Respondents apologized to the Court, they do not provide an explanation as to why they did not address or investigate the documents Petitioner provided to the Court as part of his habeas petition, or notice that the Supreme Court docket they submitted did not "match-up" with the other documents filed on collateral review. This "oversight" is not an isolated incident, as will be discussed further.

DISCUSSION

Exhaustion and Procedural Default

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

Proper exhaustion requires a petitioner to have "fairly presented" to the state courts the exact federal claim he raises on habeas by describing the operative facts and federal legal theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.").

Additionally, a federal habeas court generally may not review a claim if the state court's denial of relief rests upon an independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). The United States Supreme Court has explained:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court

> could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31. Thus, in order to prevent a petitioner from subverting the exhaustion requirement by failing to follow state procedures, a claim not presented to the state courts in a procedurally correct manner is deemed procedurally defaulted and is generally barred from habeas relief. See id. at 731-32.

If a state court expressly applied a procedural bar when a petitioner attempted to raise the claim in state court, and that state procedural bar is both "independent"[2] and "adequate"[3] – review of the merits of the claim by a federal habeas court is ordinarily barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002) ("[T]he procedural default rule barring consideration of a federal claim 'applies only when a state court has been presented with the federal claim,' but declined to reach the issue for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally barred.'") (quoting Harris v. Reed, 489 U.S. 255, 263 n.9 (1989)).

Specifically, in Arizona, claims not previously presented to the state courts via either direct appeal or collateral review are generally barred from federal review because

[2] A state procedural default rule is "independent" if it does not depend upon a federal constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

[3] A state procedural default rule is "adequate" if it is "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-53 (1982)).

an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive petition is permitted. See Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior Rule 32 post-conviction proceedings. See, e.g., Stewart, 536 U.S. 856, 860 (2002) (determinations made under Arizona's procedural default rule are "independent" of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), rev'd on other grounds, Stewart, 536 U.S. 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (9th Cir. 1998) (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); State v. Mata, 185 Ariz. 319, 334-36, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the "cause and prejudice" test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. "A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis." Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations and internal quotations omitted). The petitioner must also show actual prejudice, not just the possibility of prejudice. U.S. v. Braswell, 501 F.3d 1147, 1150 (9th Cir. 2007).

Regarding the "miscarriage of justice," the Supreme Court has made clear that a fundamental miscarriage of justice exists when a Constitutional violation has resulted in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96. Additionally, pursuant to 28 U.S.C. § 2254(b)(2), the court may dismiss plainly meritless claims regardless of whether the claim was properly exhausted in state court. See Rhines v. Weber, 544 U.S. 269, 277 (2005) (holding that a stay is inappropriate in federal court to allow claims to be raised in state court if they are subject to dismissal under § 2254(b)(2) as "plainly meritless").

A. Prosecutorial Misconduct.

Petitioner's claim of prosecutorial misconduct was not exhausted in the state court. Petitioner did not raise the issue on appeal, and the trial court found that the claim was precluded in PCR proceedings as not having been raised on appeal. See, Ariz. R. Crim. P. 32.2(a)(3) (claim not raised at trial or on appeal is precluded under Rule 32.1(a)). Petitioner's unexhausted claim is procedurally defaulted, as a return to state court now to exhaust this claim would be futile in light of Arizona State procedural rules. See, Ariz. R. Crim. P. 32.1(d)-(h), 32.2(a) & (b) (30-day time limit; successive PCR petitions are limited to claims of being held in custody beyond sentencing expiration, newly-discovered facts, requests for delayed appeal, significant change in the law, and actual innocence). Claims filed outside the time limit not raising an exception set forth in the Rules, are subject to summary dismissal. See, e.g., State v. Diaz, 269 P.3d 717, 719-21 (Ariz. App. 2012).

Petitioner claims that IAC of appellate counsel constitutes cause to excuse his procedural default of his prosecutorial misconduct claim, and that a showing of prejudice is all that is required. (Doc. 14 at 27-28.) The failure of an attorney to present a claim on direct appeal, without more, does not constitute cause to excuse procedural default. See Murray, 477 U.S. at 486 (stating that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default"). However, ineffective assistance of counsel may establish cause for a procedural default if the claim itself is "an independent constitutional

claim." Edwards v. Carpenter, 529 U.S. 446, 452 (2000). Generally, the claim "must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'" Id. (quoting Murray, 478 at 489); Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (a petitioner's failure to raise IAC of appellate counsel as a separate claim in state court proceedings renders his claim unexhausted).

In his habeas petition, Petitioner presents a separate, substantive and exhausted claim of IAC of appellate counsel, in part based upon counsel's failure to raise a claim of prosecutorial misconduct on appeal. Because this Court will analyze the merits of that independent constitutional claim, it will necessarily address cause within that rubric.

Merits

Pursuant to the AEDPA, a federal court "shall not" grant habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the state court decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). This standard is "difficult to meet." Harrington v. Richter, 562 U.S. 86, 102 (2011). It is also a "highly deferential standard for evaluating state court rulings, which demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (citation and internal quotation marks omitted). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court ... ." Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "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." Williams, 529 U.S. at 404-05. "A state court's decision can involve an 'unreasonable application' of Federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

Ineffective Assistance of Counsel

To establish a claim of IAC a petitioner must demonstrate that counsel's performance was deficient under prevailing professional standards, and that he suffered prejudice as a result of that deficient performance. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To establish deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness." Id. at 699. A petitioner's allegations and supporting evidence must withstand the court's "highly deferential" scrutiny of counsel's performance and overcome the "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. A petitioner bears the burden of showing that counsel's assistance was "neither reasonable nor the result of sound trial strategy," Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001), and actions by counsel that "'might be considered sound trial strategy'" do not constitute ineffective assistance. Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

To establish prejudice, a petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id. Courts should not presume prejudice. See Jackson v. Calderon, 211 F.3d 1148, 1155 (9th Cir. 2000). Rather, a petitioner must affirmatively prove actual prejudice, and the possibility that a petitioner suffered prejudice is insufficient to establish Strickland's prejudice prong. See Cooper v. Calderon, 255 F.3d 1104, 1109 (9th Cir. 2001) ("[A petitioner] must 'affirmatively prove prejudice.' ... This requires showing more than the possibility that he was prejudiced by counsel's errors; he must demonstrate that the

errors actually prejudiced him.") (quoting Strickland, 466 U.S. at 693). However, the court need not determine whether counsel's performance was deficient if the court can reject the claim of ineffectiveness based on the lack of prejudice. See Jackson, 211 F.3d at 1155 n.3 (the court may proceed directly to the prejudice prong).

I. Ineffective Assistance of Trial Counsel.

Petitioner claims that his counsel was ineffective in not objecting to or preventing the admission of text messages on the victim's cell phone that were allegedly sent by Petitioner through a HeyWire application ("hereinafter "HeyWire app"), and for not impeaching the detective who testified concerning these text messages. The record reflects however, that Petitioner's counsel did object to the admission at trial of text messages. (Doc. 11-2 at 251-51.)[4] The trial court held an evidentiary hearing during the trial to determine whether adequate foundation existed for the introduction of the text messages between the victim and the phone identified by the state as belonging Petitioner. (Id. at 258-67.) The state called Detective Vasile Hiticas, who testified that he had recovered a cell phone during the search of a Mercury Montego, and subsequently obtained a search warrant to search the phone. The phone number associated with that phone was identified by the victim as associated with Petitioner's phone ("Petitioner's phone"). The detective was able to find numerous text messages and phone calls between Petitioner and the victim on Petitioner's phone and on the victim's phone, as well as pictures of the two of them together on both phones. He also testified that the majority of text messages on Petitioner's phone matched text messages on the victim's phone. (Id.) From those common conversations, he was able to also determine that some of the messages had been deleted from Petitioner's phone, but that those deleted messages were recovered from "the data pulled off the phone." (Id. at 259.) However, Detective Hiticas testified that that any HeyWire app messages were not recovered from the data. (Id. at 258-59.) Detective Hiticas was not able to confirm with a phone company that the phone number associated with the phone seized was assigned to Petitioner, however, and testified that the phone may

[4] For citations to trial transcripts, this Court will not include the associated exhibit letter.

have been under his brother Nicholas's name. (Id.)

The court overruled defense counsel's objection, finding sufficient foundation for the court to conclude that the phone seized was most likely Petitioner's telephone, and that therefore "the messages are not hearsay because they are the defendant's own statements." (Doc. 11-2 at 267.) The court made no distinction in its ruling between the text messages common to both the victim and Petitioner's phone, and the HeyWire texts found only on the victim's phone. The court indicated that additional foundation may have to be laid by the victim. (Id.)

During the victim's testimony, she was asked about the trial exhibits that Petitioner asserts his counsel should have objected to - trial exhibits 162-174. Those exhibits represented the text messages sent to the victim's phone through the HeyWire app. The victim testified that she had blocked messages from Petitioner's cell phone through Dead2Me, a phone application, but that he was somehow able to get around the block by getting messages to her through the HeyWire app. (Doc. 11-2 at 251, 272.) The HeyWire app creates a new phone number. (Id. at 251.) When asked how she knew those messages originated from Petitioner, she testified that "[t]hey were threatening, aggressive. I just knew." (Id. at 273.) When asked questions concerning Exhibit 58, she confirmed that the HeyWire text message was taken off of her cell phone and was a conversation she had with Petitioner. (Doc. 23-1 at 1162-63.)

Although it is clear from Detective Hiticas and the victim's testimony that the text messages sent through the HeyWire app were not found on Petitioner's phone, Petitioner's counsel did object to their introduction, and his objections were overruled. Even if Petitioner's counsel had been more specific, and argued that the text messages sent through the HeyWire app lacked foundation because no evidence was presented as to the device from which they originated, the trial court indicated that the ruling was subject to the victim supplying additional foundation. The victim then identified the HeyWire texts as exchanges between her and Petitioner and were all texts sent around the time of the offenses and were concerning his actions and their relationship. (Id. at 120-136.) Petitioner presents

no facts that demonstrate the ruling on the admissibility of the HeyWire app texts would have been different had it been clearer to the court that those texts were **not** found on Petitioner's phone.[5] Petitioner fails to establish that his trial counsel was ineffective in not raising a sufficient objection to the admission of exhibits 58 and 162-173, the HeyWire app texts, at trial.

Petitioner also claims that his trial counsel was ineffective in not objecting to the jury's use of the prosecutor's laptop, containing trial exhibits, during deliberations. At the conclusion of the evidence, the state provided a laptop computer to the jury so that it would be able to review evidence in digital format. (Doc. 11-2 at 46-47.) Trial counsel did not object at the time, but did raise an objection during the sentencing proceedings. The trial court overruled the objection, stating that there was no evidence of anything on the laptop that was prejudicial to Petitioner and that there was no "information from which to conclude that the jury utilized the laptop for any improper purpose." (Id. at 334.) Defense counsel's failure to object, based upon the prejudicial effect of the prosecutor, as opposed to the court, providing the trial exhibits to the jury, and failure to request an opportunity to examine the laptop before submission, falls below the level of effective assistance, as any competent attorney would have done so. However, Petitioner fails to demonstrate prejudice, as there is no evidence that the laptop contained anything improper.

II. Ineffective Assistance of Appellate Counsel.

In their Answer, Respondents do not address the details of Petitioner's claim that his appellate counsel was ineffective by not raising a prosecutorial misconduct claim on appeal. In their analysis of Petitioner's prosecutorial misconduct claim, they acknowledge that Petitioner cited ineffective assistance of appellate counsel as cause for the procedural default of the claim, but dismiss the argument summarily as Petitioner did not identify an "objective factor external to the defense" that impeded counsel's effort to comply, "such that the factual or legal basis for a claim was not reasonably available," citing Coleman,

[5] In fact, the Arizona Court of Appeals also labored under that misimpression. See, Doc. 11, Exh. S.

501 U.S. at 753. (Doc. 11 at 21). However, ineffective assistance of counsel may establish cause for a procedural default if the claim itself is "an independent constitutional claim." Edwards, 529 U.S. at 452 (IAC may establish cause for procedural default if the claim itself is an "independent constitutional claim.").

In their Answer, although Respondents do not dispute that Petitioner raised an independent claim of ineffective assistance of appellate counsel in his PCR petition, they assert that:

> The trial court denied this claim "for the []reasons set forth in the State's response" that appellate counsel was not ineffective for being strategic and selecting "the most promising issue" on appeal and rejecting a meritless issue.

Respondents misread the record as to the scope of the trial court's review. The trial court did not address, in its ruling, Petitioner's claim of ineffective assistance of appellate counsel, as is evident from its ruling, which bears repeating here:

> The defendant failed to raise his claims of prosecutorial misconduct and abuse of discretion by the trial court in his direct appeal. **Further, based on the allegations in the PCR request, the Court finds that defense counsel's performance did not fall below prevailing professional norms and that no deficient performance on the part of defense counsel prejudiced Mr. Rodriguez's defense or rendered different trial results than would have been achieved through competent performance.** The Court also does not find that Defendant has stated a colorable claim for abuse of discretion by the trial court. As to one specific issue raised in that regard, the court reporter recently filed an Affidavit of Correction indicating that a statement that had been attributed in the trial transcript to defense counsel was, in fact, defendant's statement. The correction makes clear why the Court did not address the defense attorney for making such comment, since the comment was not made by him. Accordingly, and for the other reasons stated in the State's response [it is ordered denying PCR relief].

(Doc. 11, Exh. FF) (emphasis added).

In context, it is clear that the trial court did not specifically address Petitioner's ineffective assistance of appellate counsel claim, as the trial court directly addressed Petitioner's other three claims, and addressed prejudice only as to the "trial results." Respondents attempt to "bootstrap" the court's reference to the state's response, in order

to claim that the trial court specifically held that "appellate counsel was not ineffective for being strategic and selecting 'the most promising issue' on appeal," lacks transparency. Admittedly, the court also denied relief, "for the other reasons stated in the State's response," and Respondents are correct that, in the state's brief, it argued that appellate counsel was not ineffective for selecting the most promising issue on appeal. In its brief before the trial court, however, the state did not address Petitioner's prosecutorial misconduct claim. (Doc. 11-2, Exh. DD.) It argued that, "[d]efendant fails to explain how the claims he raises in his petition, **which are without merit for reasons stated elsewhere in this response**, were more promising than those raised by appellate counsel." (Id. at 15.) Since the state did not address the merits of Petitioner's prosecutorial misconduct claim - because it was waived by not being presented on appeal – it necessarily did not address whether Petitioner's prosecutorial misconduct claim was "a more promising issue than those raised on appeal." The trial court, in incorporating the state's argument on this issue, was thus deprived of a basis to support its decision. To hold otherwise would be to dispense with any requirement that a claim be identified and vetted in order to determine whether effective appellate counsel would raise it.

After reviewing Petitioner's habeas petition, Respondents' Answer, and Petitioner's Reply, this Court determined that Petitioner had identified in his pleadings numerous instances of prosecutorial misconduct, citing directly to the trial court record. The Court thus entered an Order that Respondents file a Supplemental Answer addressing Petitioner's claim that his appellate counsel was ineffective by not raising a claim that the prosecutor committed misconduct during voir dire, and during closing argument by: (1) burden shifting, (2) commenting on Petitioner's silence and failure to produce evidence, (3) vouching for witnesses, and (4) deriding defense counsel, and (5) making material misrepresentations of fact with respect to the testimony of "Celene." (Doc. 20.) Additionally, this Court ordered that Respondents produce a copy of the exhibits Petitioner attached to his PCR petition. Respondents had provided a copy of the petition, but not the exhibits with their Answer, even though Petitioner clearly references "attached exhibits"

throughout his PCR petition. (Doc. 11-2, Exh. CC.)

Respondents thereafter filed a Supplemental Answer addressing the substance of the claims, although they argue that some of the claims are not exhausted. (Doc. 23.) Respondents did not, however, provide as ordered a copy of the exhibits Petitioner had attached to his PCR petition. They provided instead, a copy of Petitioner's initial PCR petition, filed on March 2, 2015 - that was dismissed without prejudice because his direct appeal was pending - and titled it "PCR (Exh. CC) exhibits." (Doc. 23-1, Exh. U.)[6] In their Supplemental Answer, Respondents assert that Petitioner's ineffective assistance of appellate counsel claim is unexhausted as to his assertion that the prosecutor committed misconduct during voir dire and closing arguments, because Petitioner's PCR claim "was solely limited to his appellate counsel 'not raising the cognizable claims.'" (Doc. 23 at 11.) Respondents also assert that the first time Petitioner's claim was raised was in his petition for review to the Arizona Supreme Court. (Id. at 11, 12.)

These assertions are belied by the record. In Petitioner's PCR petition, he argued that the prosecutor committed misconduct during voir dire by asking potential jurors questions about having children, during an evidentiary hearing by suggesting HeyWire texts were found on Petitioner's phone, and during closing argument by expressing personal opinions, making improper remarks about defense counsel, vouching, commenting on Petitioner's failure to testify, burden-shifting, appealing to the emotions of jurors, and by making material misstatements about the evidence.[7] (Doc. 11-2, Exh. CC at 5-17.) Petitioner also argued the law on prosecutorial misconduct. And, he asserted that his appellate counsel was ineffective in not raising such a claim. (Id., at 25; Exh. EE at 3, 9.) ("Due to ineffective assistance of [appellate counsel], . . . claims of prosecutorial misconduct . . . were not waived, . . . If this court examines the claims of prosecutorial misconduct, . . . any reasonably objective counsel can determine these claims hold far more weight than those raised in appeal and claims hold sufficient merit to be reviewed.").

[6] Exh. CC, attached to Respondents' original Answer, was Petitioner's 2016 PCR petition.
[7] Petitioner references attached exhibits throughout his PCR petition

Petitioner filed a petition for review of the trial court's denial of his claims, requesting that the court review the trial court decision and determine if any of Petitioner's four PCR claims were colorable and/or procedurally barred. (Doc. 11-2; Exh. GG.) In support of his petition, Petitioner referenced the factual events set forth in his PCR petition and attachments. (Id. at 3.) Petitioner reasserted that his claims of prosecutorial misconduct and abuse of discretion were not waived, as found by the trial court, because Petitioner's appellate counsel was ineffective in not raising them. (Id.)

Despite arguing that Petitioner's ineffective assistance of appellate counsel claim is procedurally defaulted, Respondents argue, in the alternative, the merits of the claim. Respondents assert that Petitioner's "argument that prosecutorial misconduct occurred were conclusory assertions not supported by the record or the law," and therefore meritless. (Doc. 23 at 12.)

In Petitioner's habeas petition, Petitioner argues clearly that the prosecutor committed misconduct "throughout [his] trial," to include during oral argument when the prosecutor "committ[ed] fraud upon the court, presenting false and misleading arguments, misstating evidence, vouching for the credibility of government witnesses, expressing his opinion of [Petitioner]s guilty, suggesting information beyond that presented to the jury, misstating law (burden shifting) and denigration of [Petitioner]'s trial counsel." (Doc. 1 at 13.) Petitioner incorporates four exhibits attached to his petition, which includes the prosecutor's closing argument and the transcript of an evidentiary hearing held on the admissibility of text messages. (Id. at 73-179.) In the transcripts, Petitioner underlines the objectionable comments by the prosecutor during closing arguments, to include adding text in the margins such as "burden shifting," "vouching," "misstating evidence," "commenting on Petitioner's silence," and "denigration of counsel." (Id.)

Respondents assert in their Supplemental Answer that Petitioner's prosecutorial misconduct/ineffective assistance of appellate counsel claim, as set forth in collateral proceedings was conclusory and not supported by the law, and therefore not exhausted. This assertion is belied by the record, as set forth above, but also given the further

development of the state court record in this case, as discussed later herein.

On August 14, 2020, this Court appointed counsel to represent Petitioner, and ordered that she file a Sur Reply to Respondents' Supplemental Answer on or before September 30, 2020. (Doc. 24.) On September 29, 2020, Petitioner, through counsel, filed a Sur Reply. (Doc. 28.) Immediately thereafter, Respondents filed a Notice, in which Respondents represented that:

> [U]ndersigned counsel attempted to submit copies of Petitioner's PCR attachments that had been filed with the court [in response to this Court's Order on July 2, 2020], undersigned counsel recently discovered she inadvertently did not file all of the attachments (the State's trial exhibits 58, 162-173, which appear to be printed text messages, and a July 28, 2015, letter from Petitioner's attorney to Petitioner).

(Doc. 29 at 1.)

Respondents incredulously do not address the fact that they did not provide **any** of Petitioner's 2016 PCR attachments with their Answer, or their Supplemental Answer filed in response to this Court' Order that Respondents provide the PCR attachments. Neither do they address their mistaken reference to other documents as being those attachments in their Supplemental Answer. And, they admit that they "mistakenly" did not submit copies of the trial exhibits Petitioner included in his PCR attachments, but either don't realize, or simply neglect to address the fact that they also did not include copies of the trial transcripts that were part of Petitioner's PCR attachment. Yet, they now, belatedly, provide the exhibits, as well as the copies of transcripts that together constituted Petitioner's PCR attachments. The record is clear that Petitioner filed his "Attachments of Rule 32 Petition," with the trial court on November 21, 2016, and filed them "in accordance with Rule 32.5 of the Arizona Rules of Criminal Procedure," which allows "affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition." (Doc. 29-1 at 3.) Respondents previously provided the trial court docket with their Answer, but did not provide the trial court docket of collateral proceedings after the denial of direct review. (Doc. 11-2 at 125-133.) Respondents continue:

> Petitioner's PCR attachments consisted of 112 pages of mostly unmarked transcripts and exhibits, which were very confusing and hard to understand, and undersigned counsel apologizes for not submitting those exhibits to the

court earlier.

(Id. at 2.)

The transcripts referenced are the same transcripts Petitioner attaches to his habeas petition, which this Court does not find confusing, or hard to understand, and will address Petitioner's claims accordingly. What is significant about the transcripts is that they make even more specious Respondents' continued insistence that Petitioner did not fully alert the state courts to his claim of prosecutorial misconduct. Although it is not lost on the Court how challenging reviewing pro se pleadings can sometimes be, that is not the case here. Petitioner has been clear and consistent at every procedural step in his post-conviction journey as to the nature of his claims, and the facts supporting them.

Respondents next filed a Supplemental Notice to the Court, in which Respondents assert that "it was attempting to determine if Petitioner's PCR attachments, specifically the ones he identified as Exhibit 58, Exhibits 162-73, and a July 28, 2015 letter, had been filed with the Maricopa Superior Court or were on file with the Maricopa County Attorney's Office (MCAO)." (Doc. 31.) Respondents were unable to confirm that they were admitted at trial, but was able to obtain copies of the exhibits Petitioner references from the MCAO, although they are not labeled or numbered. (Id.) Respondents do not explain in their Supplemental Notice how the fact that MCAO has copies of these texts makes it any clearer that they were the exhibits admitted at trial. The Court will consider Respondents' Supplemental Notice only for the purpose of signifying that Respondents do not dispute that the trial exhibits Petitioner references were in fact admitted at trial.

Standard of Review of Trial Court Ruling.

In habeas review, the Court must begin by applying a presumption, subject to rebuttal, that a state court adjudicated all claims presented to the state court on the merits. Johnson v. Williams, 568 U.S. 289, 293 (2013); Murray v. Schriro, 882 F.3d 778, 810 (9th Cir. 2018) ("[E]ven if the state court does not analyze a claim," it is still reviewed with "deference to the state court's denial of relief."). In the absence of a reasoned opinion, "a habeas court must determine what arguments or theories ... could have supported, the state

court's decision; and then it must ask whether it is possible fair minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Harrington v. Richter, 562 U.S. 86, 101 (2011); see also, Johnson, 568 U.S. at 299 (listing circumstances the presumption that a state court reached a claim should be applied: when state law cited incorporates a federal right, when a petitioner's claim makes only "fleeting reference" to federal precedent, or when a claim is clearly insubstantial).

The presumption that the state court adjudicated Petitioner's claim of ineffective assistance of appellate counsel may be rebutted here, for the reasons stated above. The state court specifically relied on the state's response to Petitioner's PCR petition to support its decision to deny relief on any of Petitioner's claims it did not specifically address. As the state did not address the substance of Petitioner's prosecutorial misconduct claim it did not provide the court with a basis to resolve Petitioner's ineffective assistance of appellate counsel claim. Claims that were not adjudicated on the merits by the state court do not warrant deference and are reviewed *de novo.*[8] Cone v. Bell, 556 U.S. 449, 472 (2009); see also, Sherwood v. Sherman, 734 Fed.Appx. 471, 473 n. 1 (C.A. 9 (Cal.) 2018).

III. Prosecutorial Misconduct: Standard of Review.

> We stress that the ethical bar is set higher for the prosecutor than for the criminal defense lawyer-a proposition that has been clear for at least seven decades.

United States v. Weatherspoon, 410 F.3d 1142, 1148 (9th Cir. 2005) (citing Berger v. United States, 295 U.S. 78 (1935)).

It has long been recognized that prosecutorial misconduct may be grounds for reversal. See, Berger, 295 U.S. at 89. A prosecutor, though an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id. at 88. The standard of review for a claim of prosecutorial misconduct is "the narrow one of due process." Darden v. Wainwright, 477 U.S. 168, 181

[8] In the end, however, whether AEDPA deference is applied, or the claim is reviewed *de novo*, the result is the same as will be discussed herein.

(1986) (citation omitted.) "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974)). Prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Green v. Miller, 483 U.S. 756, 765 (1987) (citation omitted). The misconduct is reviewed in the context of the entire trial. Id. The Ninth Circuit employs a two-step inquiry: (1) were the prosecutor's actions improper; and (2) if so, was the trial rendered "fundamentally unfair." Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000).

Petitioner, in his Sur-Reply, asserts that the prosecutor engaged in misconduct by: (A) making repeated and gross misstatements that the victim's story was corroborated by Celene and other witnesses, (B) falsely stating that the threatening HeyWire texts were on Petitioner's cell phone, (C) impermissibly and repeatedly vouching for witnesses, (D) engaging in improper burden shifting, and (E) commenting on defendant's right to remain silent, and (F) ignoring and denigrating defense counsel. (Doc. 28 at 3-36.) This Court will analyze these claims in turn.

A. Misstating the Testimony.

(i) Celene's testimony.

Petitioner asserts that the prosecutor made material misstatements of Celene's testimony by arguing that her testimony corroborated the victim's account of the events.[9]

Celene's testimony was consistent regarding her account of what she observed of the shooting incident on January 31st. (Doc. 23-1 at 656-702.) She was in her bedroom on the second floor of the house facing Cheryl Drive at 9:00 pm, when she heard an argument coming from the street. (Id. at 657-68.) When she went to the window, she observed a vehicle parked on the street in front of her house and heard an argument between

[9] Specifically, Petitioner asserts that the prosecutor stated that the victim's account had been "corroborated" by Celene and other witnesses 19 times, citing Doc. 23-1 at 1494, 1498 (four instances), 1499 (3 instances), 1500 (4 instances), 1502, 1504, 1530 (2 instances), 1533 and 1535 (2 instances).

a man and a woman. (Id.) She heard the man's voice growing loader and it sounded like he was yelling for the woman to get back into the vehicle. (Id.) It was dark, so Celene was unable to make out the model of the car, but described it as dark, "almost [] black" and "looking almost like a Mustang Coupe." (Id. at 658-61.) She did not see the woman, but testified that she thought the girl may have been located outside the car, perhaps hiding in bushes in the shadow of a brick fence. (Id. at 670-71.) She could not see the person in the vehicle either, but soon after going to the window she heard gunshots, "three "blue flashes" of gunfire, that she believed were fired in her direction. (Id. at 661-63.) At the same time, Celene determined that the man in the car was in the driver's seat, with his firing arm extended out the window. (Id. at 661-63, 681) Celene immediately dropped to the floor to shield a young child and her dog from the gunfire. (Id. at 695-96.) She waited a few minutes after the gunfire, and then called 911. Celene did not see anything that happened after that, although she heard the car speed away. (Id.)

The victim's testimony regarding this event differed from Celene's account in some important respects. She testified that on January 31st, she was with Petitioner in his car and were on their way home when they turned into the neighborhood of Cheryl Street, where she lived. (Doc. 11-2 at 236-41.) They were arguing before they parked the car on Cheryl Street, and after the car was parked, both of them got out of the car and continued to argue for about 5 to 10 minutes on the sidewalk. (Id. at 242-44.) She testified that Petitioner did not want her to go to her house, and then "started shooting in the air to kind of get [her] attention to listen to what he [] wanted." (Id. at 24546-.) They then got back into the car and took off again. (Id.)

In his closing statement, the prosecutor emphasized several times that Celene's testimony corroborated the victim's. He stated that "Celene [] watched the whole thing go down, and watched as the defendant shot up the neighborhood." (Doc. 23-1 at 1486-87.) He then stated:

> You know that Celene watched the whole thing. You have two witnesses saying the man shot at the house., ... she came in here and testified about what she told you about. How she watched this screaming at the little - or

> that young girl; and as it escalated to the point of him holding a gun out and pointing it at the house there on Cheryl Drive, and pulling the trigger multiple times. You heard from Celene who watched it all happen. You heard the same story from [the victim] of what happened out there.

(Id. at 1489-90.)

And, repeating: "Celene, already told you, was the one who watched it all go down. All their stories jive." (Doc. 23-1 at 1500.) In addressing the proof that it was Petitioner who did the shooting, the prosecutor stated that the victim, Celene and all eyewitnesses saw his car drive away. (Id. at 1501-1502.) "Celene sees it all happening, says exactly the same thing [the victim] says happens." (Id.) The prosecutor then added that "Celene was watching the whole thing happen, and Celene knew that she wasn't really going to get shot because she's watching him shoot in a different direction, near her, but towards this house. She's not in fear because she knows what's going on, that she's not going to be getting shot at that point."[10] (Id. at 1509.)

In his rebuttal argument, in response to defense counsel's argument in closing that the state did not prove that Petitioner was the shooter, the prosecutor argued: "And we know it's him, [the victim] told you it was him. His car is seen going to. Celene Bensink is there telling you exactly what she sees. You have the whole Tindall family sitting in their house who all hear the same argument. They all corroborate each other showing he's the man sitting there yelling at [the victim], pulling the trigger." (Doc. 23-1 at 1533.)

The prosecutor was clearly trying to implant in the jurors' minds that Celene had corroborated not only the victim's testimony that an argument had taken place and that shots had been fired, but also her version of the direction in which the shots were fired, and that she witnessed Petitioner in the car and saw him drive away. This was improper. "Misstating the evidence from trial is a particularly prejudicial form of misconduct, because it distorts the information the jury is to rely on in reaching a verdict." Darden, 477

[10] It is unclear why the prosecutor contradicted Celene's testimony that she was in fear because she thought the shooter was aiming in her direction, particularly since the first question he posed on redirect was whether she was scared, to which she responded "yes." (Id. at 693.)

U.S. at 181–82. It would have been fair argument to emphasize that Celene corroborated the victim's account of an argument and gunshots on January 31st, but the prosecutor went further and stated that her testimony corroborated the whole the victim's account. The prosecutor continued improper argument as to other witnesses.

(ii) Tammy and Kiahra Tindall, Damien Mitchell, and Nancy Seager.

Three other individuals who lived on a street near where the January incident took place, testified regarding their knowledge of the July 31st incident: Tammy Tindall and her 18-year old daughter Kiahra, and Tammy's boyfriend Damien Mitchell. (Doc. 23-1 at 818.) Tammy testified that she was awakened by the sound of a male and female arguing, and then heard around 4 gunshots. (Id. at 819-821.) She ran to check on her children and met her oldest, who had also heard the commotion, at her door. (Id.) She proceeded to check on the younger kids, but they had slept through it. (Id. at 821.) Kiahra Tindall testified that she was watching television when she heard an argument from the street between a male and female. (Id. at 831-32.) She heard the male voice command the female to get into the car, shortly thereafter heard 4 or 5 gunshots, then heard a car door slam and the car drive away. (Id. at 830-38.) Damien testified that he was asleep when he was awakened by an argument between a man and a woman, and heard the female indicate that she wanted to go home and the male telling her she was going to stay with him. (Id. at 808-810.) He then heard gunshots. (Id.) Within a few minutes, the County Sheriff Officers arrived and knocked on their door. (Id. at 811-12.) None of the three witnesses observed the individuals involved.

The prosecutor again mischaracterized the witnesses' testimony. He stated that the Tindalls were "running throughout the house, taking cover, checking to see if the kids, little children, are safe. Innocent victims." (Doc. 23-1 at 1487.) After discussing how Celene "watched the whole thing," to include watching "[Petitioner] screaming at that little - - or that young girl," the prosecutor segued into the Tindall family witnesses:

> You also heard the same story from the Tindall family and Damien Mitchell, when they were awakened by the yelling, the screaming, and what was going on out there. That whole family at that house, along with Celene and [the

> victim], all told you a pretty consistent story about what he was doing; whether they saw it or just heard it, everything was the same. There's hardly any discrepancies in any of their testimony about what happened out there on the 31st.

(Id. at 1490.)

Later, the prosecutor again discussed the "same story" told by the Tindall witnesses. "The whole family that was there told you they heard the arguing and screaming and what was going on outside. Celene, already told you, was the one who watched it all go down. All their stories jive." (Doc. 23-1 at 1500.) Of course, all members of the Tindall family did not testify, and only Kiahra testified that the argument involving "screaming." Later, in his rebuttal argument, the prosecutor once again repeated these misleading characterizations, suggesting that other non-testifying members of the Tindall family corroborate the victim's account:

> We know it's him, [the victim] told you it was him. His car is seen going to. Celene Bensink is there telling you exactly what she sees. You have the whole Tindall family sitting in their house who all hear the same exact argument. They all corroborate each other **showing he's the man** sitting there yelling at [the victim], pulling the trigger.

(Id. at 1533) (emphasis added).

Another witness to the events of January 31, Nancy Seager, was driving in the neighborhood at the time, heard gunshots as she came to a stop sign and, looking around the corner, saw a "red" car stopped on Cheryl Drive, that took off as soon as she saw it. (Doc. 23-1 at 643-44, 650-54.) Although Nancy did not see any person, the prosecutor insinuated as much in arguing: "So, essentially, why is it the defendant? 1/31 shooting, [redacted], Celene, Nancy, all eyewitnesses to his car and **him driving away**." (Id. at 1502) (emphasis added).

B. Threatening Text Messages.

All of the threatening text messages admitted into evidence were texts sent to the victim through the HeyWire application. As previously noted, the victim identified the texts as coming from Petitioner because they were aggressive, and she "just knew" they were from him, even though they originated from a phone number she did not recognize.

They were not recovered from Petitioner's phone: only two other text messages, introduced as evidence during the trial, were recovered from that phone, and they pertained to the sale of a firearm. (Doc. 23-1 at 1325-27.)

Despite the fact that there was no forensic evidence to show that these HeyWire texts were sent from Petitioner's phone, the prosecutor argued that "Detective Hiticas can testify that he went through all the text messages pursuant to a valid search warrant and saw all the same text messages from the defendant's phone sent to [the victim]'s phone." (Doc. 11-2 at 252.)

In front of the jury, the prosecutor repeatedly conveyed the impression that the HeyWire texts were found on Petitioner's phone, as in this line of questioning of Detective Hiticas:

Q: ... did you obtain the cell phone records and the text messages and all that from [Petitioner]'s cell phone?

A: correct.

Q: And in comparing those records, I guess, did they match when it came to text messages sent back and forth and phone calls made to and from that phone and [the victim]'s phone?

A: Yes.

Q: And so, besides the text messages between that phone and the victim's phone lining up . . .

(Doc. 23-1 at 1321-22.) And, further:

Q: Just so we're clear, the text messages we saw on [the victim]'s phone, were those lining up to the same text messages on [Petitioner]'s phone, and the data and everything, once you got all of that?

A: correct.

(Id. at 1324.) In his closing argument, the prosecutor makes even clearer the impression he wanted to leave with the jury:

[The victim] told you about the threats and the text messages. She told you about

> the phone call right before this happened. ... She told you all about that, all of which is corroborated by her cell phone record and the text messages found on her phone, and also found and corroborated on the defendant's phone.

(Id. at 1494-95.)

> And again, later in his closing argument:
>
> Again, [the victim's] not lying about anything. Everything she's telling you is the truth and is corroborated by independent sources. The 2/14 shooting. ... Detective Hiticase [sic] told you that he looked at both phones, and that they both matched up. Of course, there was some deleted text messages on defendant's phone, but the ones that weren't deleted, everything matched up. The phone calls, the logs, the text messages. So again, what [the victim] is telling you about the phone calls and what's being said in these text messages are all corroborated by independent sources.

(Id. at 1501-02.)

In responding to the defense closing argument that the state could not prove that the phone found in the car belonged to Petitioner, the prosecutor declared that "[t]he same text messages going to [the victim]'s phone are on his phone." (Doc. 23-1 at 1534.) Although the fact that some of the text messages found on Petitioner's phone were in common with text messages on the victim's phone would have been fair argument (along with the photos on the phone) to establish that the phone located in the vehicle belonged to Petitioner, it was not proper to suggest that incriminating HeyWire texts, which were in evidence and contained the threats, were found on Petitioner's phone. This was improper.

C. Improper Vouching: "Sale" of Gun.

Petitioner alleges that the prosecutor improperly vouched for witnesses when he insinuated that the "entire Tindall family" had witnessed the same events as the victim. That assertion was addressed above in this Court's discussion of the prosecutor's misstatements with respect to Tindall family member testimony. Petitioner also alleges that the prosecutor made improper statements concerning the gun that was never located. There was a text admitted into evidence taken from the Petitioner's phone, which read: "I told him 220 for the strap and two clips." (Doc. 23-1 at 1326-27.) Detective Hiticas testified that strap and clips are slang for gun and magazines. (Id.) This message was sent within 30 minutes to an hour-and-a-half before Petitioner's arrest. (Id.) The detective was

asked if he conducted any follow-up investigation into the selling of the gun, and he responded that he did, but came up empty-handed. (Id. at 1378.)

The prosecutor decided to turn this somewhat innocuous bit of information into something incriminating. He argued in closing:

> Where's the gun, you may ask? ... No one's going to talk to [police]. Why? Why do you think any of these individuals are not going to talk to a detective about a gun they just bought, probably pretty cheap, on the street, from a guy you probably know, who probably went and told them what he did with it. They know the gun's hot. They know that it's got something on it. That's why they're buying it off the street for a couple hundred bucks. They're not going to talk to police.

(Id. at 1495.)

The prosecutor's rendering of "facts" does not constitute an inference fairly derived from the evidence. A fair inference might have been that Petitioner wanted to get rid of the gun because he knew he was under investigation. But the prosecutor went much further than that, conjuring up a damning scenario that could appear to the jury as based upon evidence, or based upon the prosecutor's special knowledge acquired in his prosecution of cases. That kind of impression can hardly be undone.

In United States v. Vargas, the Seventh Circuit Court of Appeals found improper a prosecutor's suggestion, in the absence of any evidence, that the defendant has raised his bond money through heroin dealing, where "$10,000 is nothing." Vargas, 583 F.2d 380, 385 (7th Cir. 1978).

> It is of course true that in closing counsel may make arguments reasonably inferred from the evidence presented. [citations omitted] At some point, however, the inference asked to be drawn will be unreasonable enough that the suggestion of it cannot be justified as a fair comment on the evidence but instead is more akin to the presentation of wholly new evidence to the jury, which should only be admitted subject to cross-examination, to proper instructions and to the rules of evidence. *See generally Griffin v. California*, 380 U.S. 609, 613 [].

Id.

The prosecutor, not satisfied with a potential loose-end in the state's evidence, inflamed the passions of the jury by inviting it to consider the scenario of Petitioner selling the gun illegally, to other criminals, who somehow were aware that he had committed

crimes, and therefore would not cooperate with police. This distortion of the evidence was undeniably prejudicial.

D. Purchase of Ammunition.

Petitioner argues that the prosecutor improperly exaggerated the evidence that Petitioner had purchased ammunition at the Wal-Mart. Surveillance photographs were introduced at trial showing Petitioner and the victim entering and leaving the store, but not of them actually buying anything, although a receipt showed ammunition was purchased in the general time frame. (Doc. 23-1 at 1045.) The victim also testified that they purchased ammunition on that day. (Doc. 11-2 at 276-78.) The prosecutor argued in closing however, that the physical evidence was direct, not circumstantial:

> You heard from the Wal-Mart security officer that came in and said, yeah, I was able given a date and time and I was able to narrow it down to a transaction around that time, and lo and behold we have a picture, and we have security footage of the defendant and [the victim] buying the ammunition.

(Doc. 23-1 at 1499.)

Although not as egregious a mischaracterization of the evidence as other instances discussed herein, given other comments in closing concerning the same evidence, it is reflective of a pattern of taking improper liberty with the facts.

E. Improper Vouching: Truthfulness of the Victim.

The prosecutor vouched for the truthfulness of the victim on 2 occasions in his closing argument: "So let's look at the credibility of [the victim], because we know maybe she's not the greatest high school female out there, ... but the one thing she isn't, she isn't a liar." (Doc. 23-1 at 1497-98.) Later in his argument he stated again: "she may be an interesting individual, but she's not a liar." (Id. at 1501.) The prosecutor also referred to the victim as a "little girl" and a "young child," and defendant as an "older man.[11]" (Id. at 1487, 1490-91, 1488.) It is not proper for a prosecutor to place the imprimatur of the state on the testimony of a witness. See, Carriger v. Stewart, 132 F.3d 463, 482 (9th Cir. 1997) (improper for prosecutor to state, "he did not lie to you. He is a lot of things but he is not

[11] Petitioner was 23 at the time. (Doc. 11, Exh. M.)

a liar.").

F. Improper Burden Shifting and Commenting on Petitioner's silence.

Petitioner did not testify at his trial, and did not present any testimony or evidence, but defense counsel argued vigorously the credibility of the victim, and that the state failed to meet its burden of proving its case beyond a reasonable doubt. (Doc. 23-1 at 1512-1527.) In particular, he stressed that no person other than the victim identified Petitioner as the individual that fired the gun on January 31st and February 14th, and that there was no evidence to establish an intent to harm any of the victims inside the residences. (Id.) The prosecutor commented, however, on Petitioner's failure to present any witnesses:

> ... what that also tells you is that everything that the State put in front of you is undisputed. All the evidence that came from that stand, all the physical evidence, the pictures, the tangible items, the casings, all of that is undisputed. No one took the stand and said anything different than what [the victim] told you about what I told you in the opening statement what happened. The State's case is undisputed on what happened, ... He's guilty of every single one of [the count's], and the evidence against him is undisputed.

(Doc. 23-1 at 1511-12.)

Defense counsel began his closing argument by emphasizing that the defense absolutely disputed the State's evidence. (Doc. 23-1 at 1517-18.) He emphasized that the state has the burden of proving that Petitioner was the person who committed the acts, and as to some of the counts, that he intended to put the victims in reasonable apprehension of immediate physical injury - and concluded his argument by again stating, "[s]o yes, we do dispute the charges." (Id. at 1515, 1527.) The prosecutor began his rebuttal by further atomizing the issue:

> Defense counsel got up here in his opening [sic] and talked to you about he takes issue with the State saying that its case is undisputed. Well, really what it is his client takes issue with the State saying that its case is undisputed. Well, really what it is his client takes issue with accepting responsibility. He takes issue with he's being prosecuted for a crime. Because what's undisputed here is what came from the stand, from the witnesses. No one came in here and disputed anything [the victim] told you. No one came in here and disputed anything any of the police officers told you. No one came in her and disputed anything any of the other civilian

victims, our innocent victims told you.

(Id. at 1527-28.)

Petitioner's counsel objected to the "burden shifting" argument, and the court sustained the objection, advising the prosecutor that there are "different ways you can argue your point." (Id. at 1528.) The prosecutor then reminded the jury that, referring to an instruction, the defense "is not required to produce any evidence," but then stated, "[w]hether or not any of the evidence that was present was disputed is up to you to determine," as if to suggest that if the evidence was not disputed, then the jury's job is done. (Id. at 1528.) The prosecutor then held to this theme by asking, "[w]hat evidence contradicted what [the victim] told you happened?" Although defense counsel objected, his objection was overruled. (Id.)

Later in his rebuttal closing, the prosecutor addressed the defense argument regarding the testimony of Officer Stein. The prosecutor, adopting in part the voice of defense counsel, argued:

> ... just don't believe Officer Stein. That's his argument. Just don't believe the officer. Just discredit anything the officer has to say. I'm not going to tell you why. I'm not going to give you any reasons. I'm not going to – there's no evidence that contradicts what he had to say, so just throw it out because it hurts my client. That was his argument.

(Id. at 1534-35.)

At the conclusion of argument, defense counsel objected to the prosecutor's improper argument and moved for a mistrial. (Doc. 23-1 at 1539.) The prosecutor disputed that the argument was improper or that he engaged in burden shifting. (Id. at 1540.) The trial judge denied a mistrial, but found that "the argument crossed the line into – when taken in totality into indicating that the defendant failed to put on a case." (Id. at 1540-41.) The jury was not admonished.

The prosecutor's repeated emphasis on evidence "undisputed" also amounted to a comment on Petitioner's silence, as Petitioner did not take the stand, and he was the only one who could have disputed the victim's identification of Petitioner as the person who

was at the scenes and fired the gun on January 31st and February 13th. Although there were witnesses who heard the commotion, no one but the victim identified Petitioner as being present or firing the gun. Additionally, no person but Petitioner could dispute the victim's testimony that the incriminatory HeyWire texts were sent by Petitioner. Thus, when the prosecutor three times argued that "[n]o one took the stand and said anything different than what [the victim] told you," particular emphasis was placed on Petitioner's silence. Additionally, his comment on Petitioner's "failure to take responsibility" can only be interpreted as his failure to respond in some way, either by testifying or pleading guilty.

The prosecutor bears the burden of proof in criminal trials. In re Winship, 397 U.S. 358, 364 (1970 ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged); United States v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1991) ("We are compelled to reverse the judgment of conviction," due in part to prosecutorial misconduct that included burden shifting). "It is well-established that the privilege against self-incrimination prohibits a prosecutor from commenting on a defendant's failure to testify." United States v. Castillo, 866 F.2d 1071, 1083 (9th Cir. 1988) (citing Griffin v. California, 380 U.S. 609 (1965)).

In determining whether a comment on the failure of the defense to produce evidence is an improper comment on defendant's silence, the test is whether the comment is "manifestly intended to call attention to the defendant's failure to testify, and is ... of such a character that the jury naturally and necessarily take it to be a comment on the failure to testify." Castillo, 866 F.2d at 1083 (citation omitted). Reversal is mandated when the prosecutor's comment on a defendant's failure to testify "is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal." United States v. Kennedy, 714 F.2d 968, 976 (9th Cir. 1983), cert. denied, 465 U.S. 1034 (1984) (citing Anderson v. Nelson, 390 U.S. 523 (1968)).

The prosecutor engaged in improper burden shifting and commented extensively on

defendant's silence, and the trial court essentially agreed, stating that his comments "crossed the line." The prosecutor "manifestly intended" to call attention to Petitioner's silence, and the entirety of silence from the defense.

G. Denigration of Defense Counsel.

The prosecutor made several comments directed at defense counsel in closing argument. When discussing the victim, the prosecutor argued:

> [I]t's a common tactic to always attack the victim in a case, and defense counsel tried to do that numerous times with [the victim]. Tried to point out that she was suspended from school, implied her using a fact [sic] ID with Officer Stein.

(Doc. 23-1 at 1497.)

In rebuttal argument, he continued:

> When you look at what defense counsel just did in his opening statement, the one question came to my mind is: What's the defense? I mean, what was he arguing to you? Was it this wasn't an intentional act? Because that seemed to be the argument on some of the counts. And on other counts, it was, oh, it wasn't my client. It either was your client and he was there and that you're disputing whether or not he's acting with a different mental state of whether it's an intentional act or an agg assault or disorderly conduct; or it's just not him. Which one is it? He got up here and just tried to confuse the issues. It's a red herring, it's smoke and mirrors. He's doing it because he's representing his client, of course. But what's the defense? There wasn't any. **There was none presented to you.**

(Id. at 1528-29) (emphasis added).

Defense counsel's objection was sustained. (Doc. 23-1 at 1529.) Giving passing reference to the defense counsel having argued "credibility of witnesses," the prosecutor continued:

> Do you have to have every little piece [of evidence]? ... You don't have every single piece of the puzzle ... The State didn't prove every little detail.
>
> That's what counsel is arguing. One of those like blank spaces is what defense counsel is arguing when it comes to Wal-Mart. Oh the State didn't have video of him actually purchasing the ammo, we just have him walking in and walking out of the store with a bag, and a receipt of purchasing ammo at around the same time or at the same time he's in the store.

> I mean they're just questioning the case. I mean if we say hypothetically, we have the video of that, the next argument is going to be: Well, they didn't collect the cash that was used in this case.
>
> Well, maybe if we collected the cash, well, they didn't test it for DNA. Really? It's a red herring.
>
> Defense counsel's asking you to look at just one of those things, and it doesn't prove the case. ... If the State walked in here, called its first witness, was the clerk from Wal-Mart that says someone bought bullets on such and such a day, there's some surveillance video, the State rests, and I come in here and ask you to convict him of shooting up two different houses because there are some bullets used, no. You have to look at ... all the pieces of the puzzle.

(Id. at 1530-32.) And, once again assuming the voice of defense counsel stated:

> His argument to the forgery count, ... just don't believe Officer Stein. ... Just discredit anything the officer has to say. I'm not going to tell you why. I'm not going to give you any reasons. ... just throw it out because it hurts my client.

(Id. at 1535.)

The prosecutor told the jury that defense counsel's defense: was a "common tactic," a red herring, smoke and mirrors, simply an "obligation" to the defendant, would shift with the evidence, and was manufactured "just because" the evidence hurts the defendant. There was no evidence presented at trial to support these pejorative assertions, and the jury likely concluded that the prosecutor characterization came from experience. The comments were clearly intended to denigrate defense counsel and not simply fair comment on the defense. Mere criticism of defense theories and tactics is a proper subject of closing argument. United States v. Sayetsitty, 107 F.3d 1405, 1409 (9th Cir. 1997). However, "[a] personal attack on defense counsel's integrity can constitute misconduct." United States v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995) (citation omitted).

In determining whether improper remarks about defense counsel are harmless, the court looks to: (1) whether the remarks were made at an important stage of trial; (2) whether they were extensive or isolated; (3) whether they were accidental or calculated to

wrongfully impute guilt; (4) whether they "strike at the jugular" of the defendant's story; and (5) whether they were "withdrawn after objection." Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (citation omitted). The cumulative effect of such comments could reasonably be seen as affecting the jury verdict. Id. Improper comments during rebuttal closing argument is particularly prejudicial because they are the last words the jury hears before deliberating. United States v. Sanchez, 659 F.3d 1252, 1258 (9th Cir. 2011).

A great many of the improper comments were made in rebuttal argument, leaving defense counsel with no opportunity to respond, and the trial court overruled defense counsel's objection without giving a curative instruction. These were the final moments before deliberation. Given the repetition of the accusation of a "conjured" defense, the comments were indisputably calculated to mock and eviscerate Petitioner's reasonable doubt defense. The prosecutor's improper argument was not harmless based upon the Bruno test factors, as it could reasonably be seen as affecting the jury verdict.

Many courts have found comments like the ones made here to be improper. See, United States v. Mathews, 240 F.3d 806, 819 (9th Cir. 2000) (defense counsel trying to hide what they are doing, like "an octopus squirting ink – a statement "unworthy of a representative of our government); United States v. Frederick, 78 F.3d 1370, 1379 (9th Cir. 1996) (commenting that defense counsel was "very good at his job" of confusing the victim and implying that defense counsel was underhanded); Williams v. Borg, 139 F.3d 737, 744-45 (9th Cir. 1988) (arguing that defense counsel had deliberately called a witness who would invoke); United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005) (referring to defense counsel's tactic as "smoke and mirrors" and a "red herring" designed to distract the jury from the truth).

CUMULATIVE ERROR: DUE PROCESS.

The "cumulative effect of multiple errors may [] prejudice a defendant" such that reversal is required. Frederick, 78 F.3d at 1381; United States v. Preston, 873 F.3d 829, 845 (9th Cir. 2017) (when "cumulative error is so clear," the court need not analyze each instance of misconduct for prejudice). Although some of the categories of misconduct

described herein alone may compel reversal,[12] the entirety of the prosecutor's misconduct at trial, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181.

Additionally, even if harmless error were to apply, as stated previously the victim was the only witness to identify Petitioner as the shooter, the only witness to describe the volatility of their relationship and identify and interpret the HeyWire threatening text messages, and her credibility was called into serious question by defense counsel. (Doc. 28 at 3-5.) The victim also asserted the Fifth Amendment in refusing to answer several questions relating to her truthfulness. (Id.) Witness Maldonado also described the victim's older sister as being involved in tempestuous relationships, involving yelling and screaming, and was dropped off in front of their house on a regular basis in a similarly described vehicle. (Id. at 39-40.)

Petitioner was entitled to the effective assistance of counsel on direct appeal. See Coleman, 501 U.S. at 755-56. Petitioner specifically implored his counsel to raise prosecutorial misconduct before the jury as an issue, but was told:

> As a strategic matter, I did not end up filing on the issue regarding juror taint or closing arguments we spoke about. The case law I found did not support the arguments. Because I didn't want to weaken your best argument with weak points, I elected to focus entirely on the suppression issue. Although it's a long shot, I hope we can get your case reversed. 42 years on a case like this is just too harsh.

(Doc. 29-1 at 114.)

It is inconceivable that counsel pursued a "long shot" suppression issue over Petitioner's prosecutorial misconduct issue for strategic reasons, given the glaring instances of impropriety in the record. Any reasonably competent attorney would have addressed the issue on appeal, since there were no strong issues presented that could be "weakened" by its inclusion. "The proper standard in evaluating ineffective assistance of appellate counsel is articulated in *Strickland*." Smith v. Robbins, 528 U.S. 259-60 (2000). This would necessitate an analysis of the claim an appellate lawyer declined to raise. The

[12] Such as the false statements regarding the HeyWire texts. See, Miller v. Pate, 386 U.S. 1 (1967).

Supreme Court in Coleman did not dispense with this requirement. In failing to address the merits of Petitioner's prosecutorial misconduct claim, the trial court decision was contrary to, or an unreasonable application of Supreme Court precedent.

Additionally, even if the record was clear that the trial court's denial of Petitioner's claim was based upon appellate counsel's "selecting the most promising issue" on appeal, that decision was based upon an unreasonable determination of facts, in light of the evidence presented in the state court proceedings. Petitioner raised the issue of ineffective assistance of appellate counsel, specifically based upon the failure to raise prosecutorial misconduct as an issue on appeal. Although Respondents initially argued that Petitioner's PCR claims were vague and conclusory, Petitioner cited transcripts and copies of exhibits in the attachment (the "attachment" so belatedly provided to this Court). In those transcripts and exhibits, Petitioner underlined sections and inserted comments that gave the necessary context to his claims. The facts supported a substantive claim of prosecutorial misconduct that would have, in fact, been the most promising issue on appeal.

Petitioner was prejudiced by the ineffective assistance of appellate counsel. Had Petitioner raised his claim of prosecutorial misconduct on appeal, for the reasons stated herein, there is a substantial likelihood that his convictions would have been reversed. This Court will therefore recommend that Petitioner's habeas petition be granted, and his convictions and sentence be reversed. This Court will also recommend that Respondents be required to show cause as to why they should not be rebuked, or sanctions imposed, as to their mishandling and misrepresentation of the record, as set forth above in the procedural history of this action.

CONCLUSION

Having determined that Petitioner's claim of ineffective assistance of appellate counsel in his habeas petition is meritorious, the Court will recommend that Petitioner's habeas petition be granted.

IT IS THEREFORE RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **GRANTED**.

IT IS FURTHER RECOMMENDED that Respondents be required to show cause as to why sanctions should not be imposed for their mishandling and misrepresenting of the record.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

Dated this 18th day of December, 2020.

Honorable Michelle H. Burns
United States Magistrate Judge

APPENDIX D

Daniel Rodriguez v. Stephen Morris, et al

U.S. Court Of Appeals, Ninth Circuit

Case no. 21-16024 (9th Cir.)
Filed date: July 19, 2022
Docket entry no.: 43

Docket text:

> Filed text clerk order (Deputy Clerk: AF): Appellant���s petition for rehearing (DE [41]) is denied. [12497097] (AF) [Entered: 07/19/2022 10:30 AM]

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR2014-107713-001
	)	
DANIEL ALEXANDER RODRIGUEZ	)	
	)	
	)	
Defendant.	)	
_____	)	

Phoenix, Arizona
December 2, 2014

BEFORE: THE HONORABLE DEAN M. FINK
Superior Court Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Trial

Cindy L. Lineburg, RPR, CR, CSR(CA)
Official Certified Reporter
CR No. 50031

THE CLERK: No, no, no. I gave them Mr. Carter's name, because he asked me that. So I just kind of need to know, because he's on hold, when we want him here, and I'm sure he will follow up, I'll ask him to follow up with an e-mail.

MR. RADEMACHER: Yes.

THE CLERK: With everybody, to let us know who was appointed.

MR. CARTER: Okay.

THE COURT: So the witness will be resuming the witness stand on Monday at 10:30.

THE CLERK: We need counsel here at 9:30.

MR. RADEMACHER: 10 o'clock.

THE COURT: Yeah, counsel should make arrangements with the prosecutor to come early, probably, and meet with his client or her client, depending on who's appointed.

THE CLERK: Okay.

THE COURT: Okay. All right. So we'll get that done. And then when we resume we'll just avoid that issue. If you get to a point where you can't do anymore direct, except for those issues, then we may have to break for the afternoon. But you'll let me know, Mr. Rademacher, if we get there.

MR. RADEMACHER: Yes, Judge.

THE COURT: Okay.

MR. CARTER: Judge, and -- well, it's going to come up, so I might as well address it now that we're on a break,

Judge. I believe that the State is intending to introduce exhibits that have cell phone records or text message calls, and I believe I alerted the Court at one point that I intend to object to them as a group when they come in.

THE COURT: Okay.

MR. CARTER: So I can put my reasoning on the record now, Judge. I'm not sure what the exhibit numbers are, but I'll object.

MR. RADEMACHER: And, Judge, I think the easiest way we might be able to satisfy any type of foundation requirements is I can put Detective Hiticas on for two seconds for a quick evidentiary hearing, based on the text messages.

Essentially what it is is the -- or [redacted] does what's called a Dead2Me app. A Dead2Me app blocks a number and blocks an individual from contacting them. However, there are ways to get around it. In this particular case the defendant was using -- I would have to look -- using a different app to get around the Dead2Me app, so he could have contact with [redacted], because she had blocked his number. That app creates a new phone number when it contacts [redacted]s phone. [redacted] can testify that the contents of the text messages are conversations she's having with the defendant.

What also I can have done, in order to kind of complete the circle for how we know it's the defendant's

statements, Your Honor, is Detective Hiticas, when the defendant's phone was seized, or the phone taken from his car or from him, Your Honor, when that phone was seized, Detective Hiticas can testify that he went through all the text messages pursuant to a valid search warrant and saw all the same text messages from the defendant's phone sent to [redacted]'s phone. And so therefore, we have completed the foundational circle for -- that these are the defendant's statements, so therefore they're not hearsay.

So that's the easiest way we can do this right now with Detective Hiticas to lay the proper foundation. And then I can just complete the foundation with [redacted] when she takes the stand. Because that's the sustenance -- that's a lot of what's going to take this afternoon are those text messages.

THE COURT: Mr. Carter, is your objection a foundational one as to the source of these text messages?

MR. CARTER: Yes, Judge.

THE COURT: Okay.

MR. CARTER: As far as -- and well, there's a hearsay objection and a relevance objection, objections to them coming in at all.

THE COURT: Okay.

MR. CARTER: Including foundation.

THE COURT: Hearsay and relevance I'm going to overrule

right off the bat. With regard to foundation, what Mr. Rademacher has outlined suggests to me that the foundation can be laid, and the question is whether we do it now in terms of having Detective Hiticas either take the stand just in front of me, or in front of the jury briefly, or whether we, with the assumption that Detective Hiticas is going to say what Mr. Rademacher has indicated he will say during his testimony, go ahead and just let them come in now, subject to that foundation being laid down the road. Those are the two options.

MR. CARTER: And, Judge, I understand that we've admitted certain items that came in subject to foundation afterwards, and if that's the way the Court wants to proceed, that's fine. However, Judge, should the detective not lay sufficient foundation, the text messages would be in then, and then at that point I'd be forced to move for a mistrial.

But I understand what the State believes their position is. Our position is that there's no indication that this phone even belonged to our client. So I understand what they're attempting to do, Judge, that's fine. If it comes in, I can't presume what the Court would do at this point, but --

THE COURT: Sure.

MR. CARTER: Be aware that at that point, once they're

in, if the foundation wasn't sufficiently laid, then I'll be forced to move for a mistrial.

THE COURT: I understand. And if for some reason the foundation is insufficient, given the content of the text messages, at least the little bit I'm aware of, I probably would have to grant the mistrial. But again, I'm assuming that it will be laid.

So, Mr. Rademacher, I guess the question is how do you want to proceed? I don't want to delay things unnecessarily and I don't know how long your detective might be on the witness stand under cross-examination if you put him on for what you see as an easy purpose.

MR. RADEMACHER: I would like to do -- take our break, come back in 10 machines or 15 minutes, do a five-minute evidentiary hearing, just based on solely that, Your Honor, and that way there is no worry about it. There's no mistrial. We can deal with it now.

THE COURT: All right. We can do that. And we'll address that before we bring the jury back in then.

MR. RADEMACHER: Thank you, Judge.

THE COURT: Okay. Let's take our 15-minute break and we'll resume with that. Thank you.

(A recess was taken.)

THE COURT: Back on. The record should reflect the presence of defendant and counsel. The jury is not present.

Mr. Rademacher, did you want to proceed with the evidentiary hearing on the --

MR. RADEMACHER: Yes.

THE COURT: You'd like to call Detective Hiticas?

MR. RADEMACHER: Yes.

THE COURT: Detective, we'll have you come up and be sworn.

(Witness sworn.)

THE COURT: Thank you. You'll have to move that out of the way, maybe, to get in the witness stand. Okay.

VASILE HITICAS

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RADAMACHER:

Q Detective, are you the case agent on this case?

A Yes, I am.

Q And we have been talking about a phone that was seized during the search of a car. Do you know what I'm talking about?

A Yes, I do.

Q And in this particular case, the Mercury Montego, was that car searched by the sheriff's office?

A Yes, it was.
Q And was a phone located in that search?
A Yes.
Q Where was that phone located at?
A It was located in the driver's side area by the driver's seat. Like in between the door panel and the driver's seat. Not in the door, but kind of like on the -- not on the floorboard either, just in between the seat and the frame of the car.
Q Okay. And did you guys seize that phone?
A Yes, we did.
Q Valid to a warrant?
A Correct.
Q And then you had a warrant to search the car; is that correct?
A Correct.
Q And then you guys did a subsequent warrant, is that correct, for the phone?
A Correct.
Q Once you did a subsequent warrant for the phone, did you look inside the phone or look at its contents?
A Yes.
Q Okay. And the phone that was found in the car, did that have a known number of (602)575-4183?
A Yes.

Q And who also provided you information about that specific number?

A The victim in this case, [redacted].

Q What did she say that number related to, who?

A She said that phone was the phone her boyfriend at the time used, Daniel Rodriguez.

Q Okay. And in this case, did you actually look at [redacted]'s phone also?

A Yes, I did.

Q And [redacted]'s phone, was she using the phone number of (623)999-8128?

A Yes.

Q And so in looking at first at [redacted]s phone, which is the subject of many of the text messages in this case, did you see a bunch of text messages on her phone from the 13th through the 14th?

A Yes, I saw numerous text messages in conversations between the two phone numbers.

Q Okay. However, on [redacted] phone, was that coming up with Daniel's number or a different number?

A It was both. The phone logs, the cell phone conversations were coming up with Daniel's phone number, also text messages with Daniel's number.

Q Okay. However, were some of the text messages coming up with a different phone number?

A Correct.
Q Okay. However, at some point did you go and look at Daniel's phone?
A Yes.
Q And in looking at Daniel's phone, were you able to compare the text messages sent from Daniel's phone to [redacted]s phone?
A Yes.
Q And in comparing the two phones, were you able to find exact matches of one phone calling the other phone at a certain time?
A Correct.
Q Also, on the phone, or the defendant's phone in his car, did you find pictures on that phone?
A Yes.
Q And what were those pictures of, just generally?
A Pictures of Daniel Rodriguez posing together with [redacted], like selfies. Just general pictures that would lead me to believe that the phone belonged to Daniel.
Q Okay. Besides the pictures, did you look at text messages on Daniel's phone?
A Correct.
Q And did the majority of text messages on Daniel's phone match the exact text messages on [redacted]s phone?
A Yes.

Q However, there were a few that had been deleted on Daniel's phone; is that correct?

A Correct.

Q However, in looking at the entire conversation, you can find the entire conversation on [redacted]'s phone; is that correct?

A Correct. Even after we pulled the data off the phone, the erased ones were still there, except for the ones that were used with that HeyWire app. Those were not recovered from the data.

Q Okay. So you could even see some of the deleted text messages off of Daniel's phone that were sent to [redacted]'s phone?

A Correct.

MR. RADEMACHER: I have nothing further, Your Honor.

THE COURT: Before we get cross-examination, I have just a couple of questions. And then I'll let Mr. Carter cross on them.

Were you able to confirm with any company that the that the main number, not the number associated with the HeyWire app, was associated with or assigned to an account with Mr. Rodriguez?

THE WITNESS: We were able to confirm through the phone company that that phone was assigned to that number. I don't recall that if -- I don't recall that Daniel Rodriguez

had that phone under his name. It may have been under Nicholas' name.

THE COURT: Okay. Okay. Thank you. And when counsel was questioning you about Daniel's phone or the defendant's phone, you're referring to the phone that was located in the car as a result of the search warrant -- in association with the search warrant?

THE WITNESS: Correct. The only phone we found in the vehicle.

THE COURT: Thank you.

Okay. Mr. Carter.

CROSS-EXAMINATION

BY MR. CARTER:

Q Now, the car that we're talking about is the Mercury Montego, right?

A Correct.

Q It's the same Mercury Montego that was seen a few hours before with at least four people inside of it, do you recall the testimony that you heard?

A Yes, correct.

Q And you're aware of that from being the case agent, that there were at least four people in that car prior to it being seized and searched?

A Correct.

Q At some point within that day, right?
A Yes.
Q All right. Now, the warrant that you received for the phone, or for the contents of the car, you specifically got a search warrant for the contents of the phone, am I right?
A Correct.
Q All right. And when did you receive that?
A I don't remember the exact time or date, but it was some time after the phone was seized from the vehicle.
Q Well, that leads to my next question. You got a search warrant for the phone, right?
A Correct.
Q But you don't recall what time it was signed so you could actually go into the phone, is that right?
A Correct. I'd have to look at the search warrant --
Q Do you have it?
A -- to refresh my memory. We have a copy of it.
Q I'll tee the question until you tell -- or if you can find the search warrant, if you have it. Do you have it with you here?
A I believe it may be in the binder sitting at the State's desk. I didn't personally bring a copy with me to court today.

Q The search warrant was for phone number (602)575-4183; is that right?
A Correct.
Q And there was another search warrant that went to either New Star or Cricket, correct?
A Correct.
Q And that was associated with that same phone number; am I right?
A Yes.
Q And the search warrant that went to New Star or Cricket, you were able to receive some information from that company, correct?
A Correct.
Q All right. And that would have included the subscriber information, is that right?
A Correct.
Q And I believe you testified earlier that you don't know who the subscriber was?
A Yes, I can't remember off of the top of my head right now.
Q And you have that information as well somewhere?
A Yes.
Q You want to take a look?
A Sure, if I could step down.
THE COURT: You may.

MR. RADEMACHER: Judge, all of this stuff was disclosed electronically, so it's going to take a while to go through the disk and pull it off. So -- I mean --

THE COURT: Counsel, let me ask you this question. We have an hour left of the jury's time. If it's going to take us a while to get this accomplished, I'm wondering whether we shouldn't let them go and bring [redacted] back on Monday to testify at that time, and then spend the rest of the afternoon allowing you to find the information that's relevant to this particular impromptu evidentiary hearing, and complete the evidentiary hearing so we're done with at least that issue.

That's one way we can proceed. Or if you think you can find this fairly quickly, and we can get this done in the next 10 to 15 minutes, then we can keep the jury and try to have 30 minutes of testimony with the jury. But I don't want to keep the jury until 4:15 only to release them at that point.

MR. CARTER: Judge, I have some warrants here, but I'm not sure if they're the right ones, so give me a few minutes.

THE COURT: Okay.

MR. RADEMACHER: Everyone is looking right now, but I would just argue that -- the objection is hearsay. I'm laying foundation for hearsay. There's no motion pertaining

to an invalid search or anything like that.

THE COURT: I understand that, but I don't think the objection is hearsay if the objection is the foundation as to whether or not these messages were from Mr. Rodriguez. There was a hearsay objection, but that's overruled since it's the defendant.

MR. RADEMACHER: Correct. Did you find it?

MR. CARTER: I'll see if this is it.

You can return to the witness stand.

THE COURT: Thank you, Detective.

Q. BY MR. CARTER: Detective, what I have are affidavits for a search warrant. Let me see if the search warrant is actually contained within what I have.

MR. CARTER: And, Judge, I apologize. I only have the affidavits. I don't have the specific search warrant being returned or the return as to when he received a signed copy of the search warrant, which is what my specific question was, so --

THE COURT: Okay. Well, I guess my question to you, Mr. Carter, is what does the timing of the search warrant have to do with whether or not this is Mr. Rodriguez's phone versus somebody else's phone, which is, I believe, the reason we're holding the hearing?

MR. CARTER: Well, Your Honor, I believe that as far as it being allowed in foundationally, whether or not this

detective searched the phone prior to the search warrant being either authored or approved by the court is a question. And whether or not there was any information that he had regarding the subscriber is an issue as well.

So those are the two questions I have remaining that were unable to be answered. Well, he did answer, his answer was he didn't know. So beyond that, Judge, I don't have any other questions.

THE COURT: Okay. I am concerned -- I'm less concerned about the timing of the search warrant. That could have been an issue and might have been an issue at some point, but I'm not particularly concerned about that today. The subscriber information, I am more interested in.

But, Mr. Rademacher, do you have some questions, or do you want to address that?

REDIRECT EXAMINATION

BY MR. RADEMACHER:

Q The subscriber information, is it your recollection that either comes back to Daniel Rodriguez or Nicholas Rodriguez?

A Yes.

Q So it's either the defendant or his brother that the subscriber information came back to; is that correct?

A Yes.

Q And throughout this case, did you find other things besides the car, and the gun, where the defendant was using his brother's ID or identification to do things?

A Correct. The car was to Nicholas Rodriguez and the firearm also was to Nicholas Rodriguez.

Q Okay. And so besides the defendant using his brother's identification, did you actually look at the brother's phone in this case?

A Yes, I did.

Q And when you looked at the brother's phone, Nicholas Rodriguez, did Nicholas Rodriguez's phone have things associated with Nicholas Rodriguez?

A Yes, it did.

Q Did it have any pictures of [redacted] on it?

A Not on Nicholas' phone.

Q Did Nicholas have any pictures of the defendant and [redacted] on it?

A No.

Q So, essentially, in the search of the apartment and the car, you received two phones, correct?

A Yes.

Q One was in the defendant's vehicle, correct?

A Yes.

Q The other one was inside the apartment?

A Yes.

Q The one inside the apartment had nothing but Nicholas Rodriguez's information and pictures on it; is that true?

A Correct.

Q The one in the defendant's car had text messages, phone calls, and pictures, all to [redacted], correct?

A Correct.

Q And a majority of those all lined up on [redacted]'s phone, correct?

A Correct.

MR. RADEMACHER: Nothing else, Your Honor.

THE COURT: Thank you. You may step down, Detective. Thank you.

THE WITNESS: Thanks.

THE COURT: The Court's inclined to overrule the foundational objection based on the testimony of the detective. I think some of the questions that the defense might raise go to, perhaps, weight to be given to the evidence. But I think there's sufficient foundation for the Court to conclude that this is most likely the telephone of the defendant and, therefore, the messages are not hearsay because they are the defendant's own statements.

There may be some additional foundation to be laid from [redacted] when she resumes the witness stand, but I'm going to overrule the foundational objection. I've already

overruled the hearsay and the relevance objections to the text messages.

MR. CARTER: Judge, before we resume, we just want to make sure that we are objecting, again. I understand the Court's ruling, I understand the Court's ruling on all the objections, but we still object to the calls being published in front of the jury -- not the calls, but the text messages.

THE COURT: I understand. And I think you've preserved that objection fairly well for the record.

With regard to any objection related to the timing of the subpoena -- or, excuse me -- the search warrant, I presume you'll have a look at that and let the Court know whether there's anything further that should have been done there. But again, that's not the Court's focus at this time.

MR. RADEMACHER: I'll get [redacted].

THE COURT: Are we ready to proceed, or do we -- with regard to any foundation that [redacted] might lay, is that something we should do with the jury present prior to the text messages, or do you want to --

MR. RADEMACHER: Detective Hiticas would be able to lay more foundation in his testimony regarding the numbers better than [redacted] can, because he's the one who looked at all the data. So -- I mean she can testify to the contents

of the text messages, but if there's kind of what we just did with Detective Hiticas, I intend to do similar foundational questions with him when he is called also, Judge.

THE COURT: Yeah, and I would expect that evidence to come in at that time. But I think we can proceed, bring the jury back in, and bring [redacted] back up to the witness stand at this time, unless anybody has a concern about that.

MR. RADEMACHER: No, Judge.

MR. CARTER: No.

THE COURT: All right. Thank you. I'll remain on the bench. If you want to have [redacted] assume the witness stand, we'll go get the jury.

(The jury enters the courtroom.)

THE COURT: The record should reflect that the jury is now again present with us. We have Miss Gewarges on the witness stand again. And I apologize for the delay, folks. When we left we were in the midst of her direct examination.

So Mr. Rademacher, if you'd like to continue with some questions, you may.

MR. RADEMACHER: Thank you, Judge.

[redacted],

recalled as a witness herein, having been previously duly sworn, was examined and testified further as follows:)

C E R T I F I C A T E

I, Cindy L. Lineburg, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

DATED this 23rd day of April, 2015.

/s/

Cindy L. Lineburg, RPR, CR, CSR (CA)
Official Certified Reporter
No. 50031

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR2014-107713-001
	)	
DANIEL ALEXANDER RODRIGUEZ	)	
	)	
	)	
Defendant.	)	
_____	)	

Phoenix, Arizona
December 9, 2014

BEFORE: THE HONORABLE DEAN M. FINK
Superior Court Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Trial

Cindy L. Lineburg, RPR, CR, CSR(CA)
Official Certified Reporter
CR No. 50031

that we see here in Exhibit 14; is that correct?

A Correct.

Q Now, besides the gun and the car that we've kind of talked about so far in this case, did you look at the cell phones?

A Yes.

Q And what part of the cell phones -- or what were the two things that you had the cell phones analyzed for, I guess? Or what are the two things you looked at the cell phones?

A Well, we're looking for phone calls and text messages mainly, in this case, because of the communications between the two cell phones. So we're looking to see if the one cell phone that we found in the defendant's vehicle matched call records and text messaging records from the victim, [redacted]'s cell phone in this case.

Q Okay. And the cell phone that you have in front of you, did you obtain the cell phone records and the text messages and all that from that cell phone?

A Correct.

Q And when you obtained those records, were you able to compare those records on that phone to the records on [redacted]'s phone?

A Correct.

Q And in comparing those records, I guess, did they

match when it came to text messages sent back and forth and phone calls made to and from that phone and [redacted]'s phone?

A Yes.

Q And so, besides the text messages between that phone and [redacted]'s phone lining up, did you have someone else look at the actual GPS location or the GPS data on that phone?

A Correct. I had Detective Dever look at the cell phone tower information for the cell phone.

Q And why was it important to look at [redacted]'s phone and the defendant's phone in this case, what's important about the cell phones?

A Well, it was their means of communicating back and forth to each other is one of the reasons. Also, we had [redacted] at the time of the incident and had her cell phone with us, so we knew where her cell phone was at, so we thought it would help us determine where the other cell phone was at during the time of these incidents.

Q And in regards to [redacted]'s phone, was it your understanding at certain times certain calls were made either to the defendant or to 911, from [redacted]'s phone?

A Correct.

Q And, specifically referencing [redacted]'s phone, were you able to confirm or disprove any of those?

A Yes, we were able to confirm the 911 calls and the

other calls that she told us she did.

Q Okay. And would those be calls between [redacted]'s phone and the phone taken from the defendant's car?

A Yes.

Q Now, I want to show you Exhibit 78 and 158.

MR. RADEMACHER: May I approach the witness?

THE COURT: Yes.

Q BY MR. RADEMACHER: Let the record reflect I'm handing Exhibit 78 and 158. Can you take a look at those for me, Detective?

A Correct. I looked at them.

Q And what are those pictures of?

A These are photographs of text -- some of the text messages from the defendant's phone.

Q Okay. And just so we're clear, you have -- or you provided copies of all of the phone information to -- I guess to the parties or to the State; is that correct?

A Correct.

Q So, there are -- all the text messages and phone data and data and all that stuff that's been provided, correct?

A Correct.

Q These are just two of the things we're looking at on his phone.

A Correct.

Q And are these a fair and accurate representation of just two of the messages that you took from his phone, or that you took pictures of from his phone?

A Correct.

Q Just so we're clear, the text messages we saw on [redacted]'s phone, were those lining up to the same text messages on Daniel's phone, and the data and everything, once you got all of that?

A Correct. Anything that wasn't either erased or used through the text messaging application on the smart phones.

Q Okay.

MR. RADEMACHER: At this time the State moves into evidence Exhibits 78 and 158.

MR. CARTER: Objection, Judge. I believe we made a record regarding the text messages before, and same objection to these ones. Also object to the classification as Daniel's cell phone.

THE COURT: And subject to those objections that were previously made, as well as any new objections, Exhibit 78 and 158 are admitted.

(Exhibit Nos. 78 and 158 were received in evidence.)

MR. RADEMACHER: May I publish, Your Honor?

THE COURT: You may.

C E R T I F I C A T E

I, Cindy L. Lineburg, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

DATED this 6th day of May, 2015.

/s/

Cindy L. Lineburg, RPR, CR, CSR (CA)
Official Certified Reporter
No. 50031

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR2014-107713-001
	)	
DANIEL ALEXANDER RODRIGUEZ	)	
	)	
	)	
Defendant.	)	
_____	)	

Phoenix, Arizona
December 11, 2014

BEFORE: THE HONORABLE DEAN M. FINK
Superior Court Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Final Jury Instructions/Closing Arguments/Jury Question

Cindy L. Lineburg, RPR, CR, CSR(CA)
Official Certified Reporter
CR No. 50031

really fast, and she's trying to get away from him.

As much as you heard about how she was still letting him back in the house and this and that, or that she was still communicating with him, she was, because she knew, she knew what was coming if she didn't. She witnessed it already of him firing a gun at Tara and Matt's house. She knew getting away from him was going to be a violent affair. She's seen it once before.

And when she came home on the 13th and got dropped off and came running inside the house to her slamming the door, and her mother had to kind of lock the door and was kind of wondering what was going on, that anger, that frustration that the defendant had is seen throughout his text messages that evening. His threats of shooting up the house, shooting her mother, all of that is all of his threats, his controlling behavior.

And those threats finally lead up to the shooting. You heard from all the detectives in this case, and the officers that were there, and talked about what everyone did and who did what, and you heard there was probably about eight or nine rounds that he could find, total, that went into this front door. I think one or two may have hit the garage, but the majority hit that front door.

[redacted] told you a lot about that shooting, too. She told you about the threats and the text messages. She

told you about the phone call right before this happened, where he's telling her he's going to shoot up the house, essentially. She told you all about that, all of which is corroborated by her cell phone record and the text messages found on her phone, and also found and corroborated on the defendant's phone.

His phone was being used in the general area. You heard from our cell phone expert in this case, who says that your phone pings off a tower at a certain sector. His phone was pinging in the area. Granted, it could be anywhere in that sector, but it's in that area. He tells [redacted] where he's at and what he's going to do. He also tells [redacted] in her text messages what he's going to do.

And more importantly, Angel Maldonado, the next-door neighbor, right after the shots are fired, goes running out of his house and sees his car leaving the scene.

Police finally catch up with the defendant, of course, as you saw from his text messages, after he sold the gun in this case. Police looked through the house that he was staying at with his brother once in a while. They went through his car, and his car, as we know, there are casings found. Those casings match back to the scene on the 31st. We know that that gun was in that car, that the casings are in the car, you're finding it, you're seeing it, they're matching the scene on January 31st.

the person who was yelling, is trying to get her back in the car.

Again, everything [redacted]'s telling you is corroborated by other sources in this case. She may be an interesting individual, but she's not a liar.

It goes on. He fired shots, corroborated by Celene, the Tindall family, corroborated by police finding the casings, the strike marks in Tara and Matt's home. She told you about that. Corroborated.

Nancy Seager. The direction that they left the scene, Nancy told you about that burgundy car leaving and what direction it was going. [redacted] told you the same exact thing, when they got in the car, what way they went.

Again, [redacted]'s not lying about anything. Everything she's telling is the truth and is corroborated by independent sources.

The 2/14 shooting. [redacted] tells you about phone calls from the defendant. Those are corroborated by her phone and the defendant's phone. Detective Hiticase told you that he looked at both phones, and that they both matched up. Of course, there was some deleted text messages on the defendant's phone, but the ones that weren't deleted, everything matched up. The phone calls, the phone logs, the text messages.

So, again, what [redacted] is telling you about the

just shot up a house. That's why he's trying to sell the gun.

The phone? It not his phone? Really? It's just pictures of him and [redacted] on there. The same text messages going to [redacted]'s phone are found on his phone.

MR. CARTER: Objection, Judge. Misstate the evidence.

THE COURT: Overruled. The jury will determine whether any of the argument correctly states what the evidence is.

MR. RADEMACHER: And the phone is found in his car, in the drive -- right there on the driver's side. It's not his brother's phone. His brother's phone, as you heard from Detective Hiticase told you, that when he met with his brother, he took his cell phone and he gave him his cell phone back. So it's not his brother's cell phone. It's the defendant's cell phone.

They're trying to have you look and say, well, there's these little things here, because he doesn't want you to focus on the bigger picture. And the bigger picture is this. Did the defendant fire the gun on 1/31? He did. He shot at the house. He put those two people in fear of getting shot, he disturbed the neighborhood. He's guilty of Count 1, 2 and 3, 4, 5, 6 and 7 for all of that.

Eight and 9, taking identity of another and the forgery count. His argument to the forgery count, you know what, just don't believe Officer Stein. That's his

C E R T I F I C A T E

I, Cindy L. Lineburg, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

DATED this 11th day of March, 2015.

/s/

Cindy L. Lineburg, RPR, CR, CSR (CA)
Official Certified Reporter
No. 50031

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR2014-107713-001
	)	
DANIEL ALEXANDER RODRIGUEZ	)	
	)	
	)	
Defendant.	)	
_____	)	

Phoenix, Arizona
December 11, 2014

BEFORE: THE HONORABLE DEAN M. FINK
Superior Court Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Final Jury Instructions/Closing Arguments/Jury Question

Cindy L. Lineburg, RPR, CR, CSR(CA)
Official Certified Reporter
CR No. 50031

was going on, I'm running around the house, checking on my kids, checking on my wife. Their peace was disturbed.

The aggravated assault. Were they in fear of getting shot? That's it. Did he intend to do it? He did. He did by taking out the gun, knowing that people were in those homes, and pulling the trigger.

He's guilty of all of these counts, ladies and gentlemen. He's guilty of all the charges. And at the end of the day, when you look at the State's case, and you look at all the evidence, the defendant doesn't have a burden at all, he doesn't have to present any evidence, and that's clear in your jury instructions. And that's what happened here in this case.

But what also that tells you is that everything that the State put in front of you is undisputed. All the evidence that came from that stand, all the physical evidence, the pictures, the tangible items, the casings, all of that is undisputed. No one took that stand and said anything different than what [redacted] told you and what I told you in the opening statement what happened. The State's case is undisputed on what happened.

And I'm sure defense counsel is going to get up here and try to poke some holes here and there. But at the end of the day, when you look at the grand scheme of things, and you look at each one of these counts, he's guilty of

every single one of them, and the evidence against him is undisputed. Thank you.

THE COURT: Thank you Mr. Rademacher. Before we have Mr. Carter's closing argument, maybe we take a short recess now, let Mr. Carter get set up, in case he need to make any changes to the layout of the courtroom, and we can come back.

I know we haven't gone quite our 90 minutes, but that way we won't have to interrupt the closings. So, folks, let's take a short break, maybe about ten minutes or so, and we will resume with the defense closing. Please keep the admonition in mind, and you are excused.

(Jury exited the courtroom.)

THE COURT: See you in a few minutes.

(A brief recess was taken.)

THE COURT: We are back on the record which should reflect the presence of the defendant, of counsel, of our jury.

Welcome back, folks, and we broke right before the closing argument of the defense.

So, Mr. Carter.

MR. CARTER: Thank you, Judge.

And ladies and gentlemen of the jury, good afternoon. I have an issue, I have an issue with Mr. Rademacher's close. Now, I understand that what we say

deliberations, I submit to you that if you follow the law, there's only one solution that you can come to, and that is that Mr. Rodriguez is not guilty on each and every count.

So, yes, we do dispute the charges in this case. And, no, the State hasn't proven their case beyond a reasonable doubt. And, yes, the only conclusion you can come to is not guilty. Thank you for your time.

THE COURT: Thank you, Mr. Carter.

Mr. Rademacher, would you like to make any rebuttal argument?

MR. RADEMACHER: Yes, Judge, if I may have a minute.

THE COURT: Sure. Take your time.

Can you see, Mr. Carter?

MR. CARTER: Yes, Judge.

THE COURT: Okay.

MR. RADEMACHER: Defense counsel got up here in his opening and talked to you about he takes issue with the State saying that its case is undisputed. Well, really what it is is his client takes issue with accepting responsibility. He takes issue with he's being prosecuted for a crime. Because what's undisputed here is what came from that stand, from the witnesses.

No one came in here and disputed anything [redacted] told you. No one came in here and disputed anything any of the police officers told you. No one came in here and

disputed anything any of the other civilian victims, our innocent victims told you.

MR. CARTER: Judge, I'm going to object to improper argument. It's burden shifting. Period.

THE COURT: Mr. Rademacher, I'm going to sustain that objection. I think there are different ways you can argue your point.

But, ladies and gentlemen, the defense, as you know from the instructions, is not required to produce any evidence, they're not, and that's in your instructions and that's clear. Whether or not any of the evidence that was present was disputed is up to you to determine based upon all the information that you receive, and counsel obviously have different opinions about that.

With that, I'm going to ask Mr. Rademacher to proceed, please.

MR. RADEMACHER: What evidence contradicted what [redacted] told you happened?

MR. CARTER: Same objection, Judge.

MR. RADEMACHER: Talking about the evidence, Your Honor.

THE COURT: I'm going to overrule in this instance. Go ahead.

MR. RADEMACHER: When you look at what defense counsel just did in his opening statement, the one question came to

my mind is: What's the defense? I mean, what was he arguing to you? Was it this wasn't an intentional act? Because that seemed to be the argument on some of the counts. And on other counts, it was, oh, it wasn't my client.

It either was your client and he was there and that you're disputing whether or not he's acting with a different mental state of whether it's an intentional act or an agg assault or disorderly conduct; or it's just not him. Which one is it?

He got up here and just tried to confuse the issues. It's a red herring, it's smoke and mirrors. He's doing it because he's representing his client, of course. But what's the defense? There wasn't any. There was none presented to you.

MR. CARTER: Objection, Your Honor.

THE COURT: I'm going to sustain the objection.

MR. RADEMACHER: And when you look at what they -- what defense counsel just argued to you, he argued credibility of witnesses, kind of the same thing he argued in his opening, and I already went through the credibility of [redacted].

[redacted] told you, from that chair right there, everything that happened on the 31st and on the 14th. And everything she told you about the gun, the car, Wal-Mart, the shootings, the text messages, the phone calls, all of it

just shot up a house. That's why he's trying to sell the gun.

The phone? It not his phone? Really? It's just pictures of him and [redacted] on there. The same text messages going to [redacted]'s phone are found on his phone.

MR. CARTER: Objection, Judge. Misstate the evidence.

THE COURT: Overruled. The jury will determine whether any of the argument correctly states what the evidence is.

MR. RADEMACHER: And the phone is found in his car, in the drive -- right there on the driver's side. It's not his brother's phone. His brother's phone, as you heard from Detective Hiticase told you, that when he met with his brother, he took his cell phone and he gave him his cell phone back. So it's not his brother's cell phone. It's the defendant's cell phone.

They're trying to have you look and say, well, there's these little things here, because he doesn't want you to focus on the bigger picture. And the bigger picture is this. Did the defendant fire the gun on 1/31? He did. He shot at the house. He put those two people in fear of getting shot, he disturbed the neighborhood. He's guilty of Count 1, 2 and 3, 4, 5, 6 and 7 for all of that.

Eight and 9, taking identity of another and the forgery count. His argument to the forgery count, you know what, just don't believe Officer Stein. That's his

argument. Just don't believe the officer. Just discredit anything the officer has to say. I'm not going to tell you why. I'm not going to give you any reasons. I'm not going to -- there's no evidence that contradicts what he had to say, so just throw it out because it hurts my client.

That was his argument, which is not what you're supposed to do. When it comes to the taking identity of another, defense counsel asked you to look at the line by line, the defendant, and intent to defraud.

He filled out federal forms to get a gun with a different identity. He's defrauding the United States. He's defrauding the federal government. He's defrauding by putting his brother's name on there in order to hide his identity in buying that gun. He's also doing it when he's buying the car. He's trying to stay off the radar by using his brother's identity.

[redacted]'s house. What happened on February 14th. He attacked Angel, who's got no skin in this game. Angel saw the car that he recognized has been there before, which also corroborates what [redacted]'s told you, that, yeah, he's there, that she's sneaking him in once in a while when mom and dad aren't paying attention. Angel saw his car leaving the area.

His phone puts him in the area. He told her exactly what he was going to do in his text messages in

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/s/

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Official Certified Reporter
No. 50031

APPENDIX I

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
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Plaintiff,	)	
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vs.	)	No. CR2014-107713-001
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DANIEL ALEXANDER RODRIGUEZ	)	
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told you about the phone call right before this happened, where he's telling her he's going to shoot up the house, essentially. She told you all about that, all of which is corroborated by her cell phone record and the text messages found on her phone, and also found and corroborated on the defendant's phone.

His phone was being used in the general area. You heard from our cell phone expert in this case, who says that your phone pings off a tower at a certain sector. His phone was pinging in the area. Granted, it could be anywhere in that sector, but it's in that area. He tells [redacted] where he's at and what he's going to do. He also tells [redacted] in her text messages what he's going to do.

And more importantly, Angel Maldonado, the next-door neighbor, right after the shots are fired, goes running out of his house and sees his car leaving the scene.

Police finally catch up with the defendant, of course, as you saw from his text messages, after he sold the gun in this case. Police looked through the house that he was staying at with his brother once in a while. They went through his car, and his car, as we know, there are casings found. Those casings match back to the scene on the 31st. We know that that gun was in that car, that the casings are in the car, you're finding it, you're seeing it, they're matching the scene on January 31st.

But where's the gun, you may ask? The police looked for it. Detective Hiticase, just yesterday, or two days ago, testified they tried to track it down. They went knocking on doors, calling the phone numbers found on the phone, on the defendant's phone. No ones going to talk to them.

Why? Why do you think any of these individuals are not going to talk to a detective about a gun they just bought, probably pretty cheap, on the street, from a guy you probably know, who probably went and told them what he did with it. They know that gun's hot. They know that it's got something on it. That's why they're buying it off the street for a couple hundred bucks. They're not going to talk to police.

But they looked into it. They tried to find it. And you saw evidence on his phone right after this shooting that evening of him trying to move this gun, a gun he just bought just a few weeks earlier, and all of a sudden he's trying to sell it. Really? Why is he trying to sell it? Because he knows he just used it in two separate shootings.

[redacted] told him in the text message that she's talking to cops or she's calling the cops. He knows the cops are on to him. Him and his buddies drive around that apartment and make the undercovers watching him. He knew he had to get rid of evidence and try to cover his butt. He

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APPENDIX J

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR2014-107713-001
	)	
DANIEL ALEXANDER RODRIGUEZ	)	
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Defendant.	)	
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Phoenix, Arizona
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the area are not individuals that you're normally going to see going to school on a consistent basis. Not getting suspended. These are the individuals that he's running with. Those are the type of people that we're going to have as witnesses.

It's not like the State can go out and pick and choose victims, or pick and choose witnesses. These are the individuals that he's associating with. [redacted] is the individual he's associating with. But [redacted]'s not on trial, the defendant is. It a common tactic, as you'll see -- you won't see, but it's a common tactic to always attack the victim in a case, and defense counsel tried to do that numerous times with [redacted], tried to point out that she was suspended from school, implied her using a fact ID with Officer Stein.

She's no angel, but just because she's no angel doesn't mean that she can get shot at or have her house shot up, or doesn't mean that -- doesn't give him carte blanche to start shooting up the neighborhood, not once, but twice, because he can't control his anger.

So, let's look at the credibility of [redacted], because we know maybe she's not the greatest high school female out there right now, but the one thing -- she might not be the ideal homecoming queen or something like that in high school, but the one thing that she isn't, she isn't a

liar.

Everything that [redacted] told you, everything that [redacted] told the police, was corroborated by independent sources and by people who had no motive, bias or any prejudice against the defendant. Everything [redacted] told you was corroborated by something else.

For example, the relationship with the defendant from the get-go, corroborated by the defendant's own brother. Someone's got some motive or bias in this case who testified, his brother definitely isn't working well with the State, I think you could see that from his mannerisms and how he was testifying. He didn't want to be here. He didn't want to testify against his brother.

So he, himself, corroborates [redacted]'s dating the defendant, that they're seeing one another. The purchase of the gun. Now, if you remember the whole series of events, if you look at it from the law enforcement angle in this case, the police didn't know anything on 1/31 except a burgundy car left the neighborhood.

It wasn't until Detective Hiticase sat down initially with [redacted], right after the shooting on February 14th, that Detective Hiticase learned about all of this. And so Detective Hiticase learned about the 1/31 shooting and started putting things together. Learned about the gun, the pawn shop, the car, all of that, and Detective

Hiticase in this investigation went out and said, you know what, [redacted], this is a sticky situation, we need to corroborate what happened. We need to be able to go out there and show you, with independent evidence, what [redacted]'s saying is actually what occurred.

And as you see, she told Detective Hiticase she was with him when they bought the gun. You saw that on the video. She testified to it. You saw the defendant using his brother's identification on the sale of the gun in this case.

The purchase of the bullets, she said she told Detective Hiticase right after she got done buying the gun, they went to a Wal-Mart and bought bullets. Detective Hiticase then went and followed up on it, and you heard from the Wal-Mart security officer that came in and said, yeah, I was given a date and time and I was able to narrow it down to a transaction around that time, and lo and behold we have a picture, and we have the security footage of the defendant and [redacted] buying the ammunition. So what [redacted] said is also, again, corroborated.

She also told the detective that he purchased a car at Easy Own, or that he was leasing a car at the Easy Own Auto place. The detective went and corroborated that, too.

Using his brother's stolen identity. She told

the person who was yelling, is trying to get her back in the car.

Again, everything [redacted]'s telling you is corroborated by other sources in this case. She may be an interesting individual, but she's not a liar.

It goes on. He fired shots, corroborated by Celene, the Tindall family, corroborated by police finding the casings, the strike marks in Tara and Matt's home. She told you about that. Corroborated.

Nancy Seager. The direction that they left the scene, Nancy told you about that burgundy car leaving and what direction it was going. [redacted] told you the same exact thing, when they got in the car, what way they went.

Again, [redacted]'s not lying about anything. Everything she's telling is the truth and is corroborated by independent sources.

The 2/14 shooting. [redacted] tells you about phone calls from the defendant. Those are corroborated by her phone and the defendant's phone. Detective Hiticase told you that he looked at both phones, and that they both matched up. Of course, there was some deleted text messages on the defendant's phone, but the ones that weren't deleted, everything matched up. The phone calls, the phone logs, the text messages.

So, again, what [redacted] is telling you about the

whether or not there was a discharge of a residential structure, his argument then turned to, well, the defendant, how do we know it's the defendant?

We know it's him, [redacted] told you it was him. His car is seen going to. Celene Bensink is there telling you exactly what she sees. You have the whole Tindall family sitting in their house who all hear the same exact argument. They all corroborate each other showing he's the man sitting there yelling at [redacted], pulling the trigger.

And then the casings from the scene are then matched to the casings found in his car. And what does defense counsel argue with that in his closing arguments? Well, multiple people were in the car when the police saw him initially. And the phone wasn't his. Really? That's what they're going with? Multiple people in the car.

So, let's really play this out for a real possibility. A real possibility is that his buddy shoots up his girlfriend's house and then decides to pin the case on him, because he's going to take the casings and he's going to put them in the car, he's going to get rid of -- somehow he's got to get the gun. I mean really? That's the ridiculous story they're trying to get you to believe.

It's his gun. He bought the thing. On his phone he's trying to sell it the day or right after the shooting. Why is he trying to sell the gun? Because he's guilty. He

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