APPENDIX

FILED

JUL 25 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ELI SLOAN, Defendant-Appellant.	No. 21-17137 D.C. Nos. 3:20-cv-08133-DLR 3:15-cr-08232-DLR-1 District of Arizona, Prescott ORDER

Before: IKUTA and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 6, and 7) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

All pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff/Respondent, v. Eli Sloan, Defendant/Movant.	No. CV-20-08133-PCT-DLR (DMF) No. CR-15-08232-PCT-DLR **REPORT AND RECOMMENDATION**

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

On June 16, 2020, the Clerk of Court filed Movant Eli Sloan's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Doc. 5)[1] after the Court granted Movant's request for leave to file the overlong Motion (Doc. 4). In December 2020, undersigned granted Movant's motion to supplement the Motion. (Doc. 30) Respondent filed its Response on December 15, 2020. (Doc. 32) Movant then filed his Reply on January 11, 2021. (Doc. 40)

On June 7, 2021, Movant filed a Motion for Bail Hearing in Order to Grant Bail Pending a § 2255 Decision by the District Court. (Doc. 47) Respondent has filed a Response. (Doc. 48)

[1] Citations to the record indicate documents as displayed in the official electronic document filing system maintained by the District of Arizona under Case Numbers CV-20-08133-PCT-DLR (DMF) and CR-15-08232-PCT-DLR. Citations to documents within Movant's criminal case are denoted "CR Doc." Citations to documents in Movant's instant § 2255 matter are denoted "Doc."

This matter is on referral to undersigned pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. (Doc. 4 at 10) For the reasons set forth below, the undersigned Magistrate Judge recommends the Court deny the Motion without conducting an evidentiary hearing, and also deny Movant's motion for a bail hearing.

I. BACKGROUND

The grand jury on July 5, 2016, returned a superseding indictment charging Movant with: (Count 1) Kidnapping violating 18 U.S.C. §§ 1153 and 1201; (Count 2) Assault with Intent to Commit Aggravated Sexual Abuse or with Intent to Commit Murder violating 18 U.S.C. §§ 1153 and 113(a)(1); (Count 3) Aggravated Sexual Abuse (vaginal) violating 18 U.S.C. §§ 1153 and 2241(a)(1); (Count 4) Aggravated Sexual Abuse (anal) violating 18 U.S.C. §§ 1153 and 2241(a)(1); (Count 5) Assault of a Spouse or Intimate Partner Resulting in Substantial Bodily Injury violating 18 U.S.C. §§ 1153 and 113(a)(7); and (Count 6) Assault of a Spouse or Intimate Partner by Strangling or Suffocating violating 18 U.S.C. §§ 1153 and 113(a)(8). (CR Doc. 40) The charges arose from Movant's alleged actions against his wife within the boundaries of the Navajo Nation on or between October 4 and 5, 2015. (*Id.*)

Movant was tried before a jury in the Court between September 6 and 15, 2016. (CR Docs. 90-96) At trial, the parties presented two contrasting versions of events that transpired on those two days. In its opening statement, the prosecution declared it would establish that Movant arrived at his wife's sister's home on October 4, 2015, stated that he wanted to buy some food and maybe diapers for his and his wife's baby, and asked to spend the afternoon with his wife, her two sisters, and the baby. (CR Doc. 178 at 213-214, RT 9/06/2016) The prosecution stated that this group traveled to Kayenta, Arizona after obtaining alcohol and went to a convenience store and purchased snacks. (*Id.* at 214) After Movant observed his wife talking to another man, Movant's mood changed and he became angry and began acting aggressively toward his wife, her sisters, and the baby. (*Id.*) On the drive back to Movant's sister's place, they stopped along the side of the road. (*Id.* at 215)

Movant grabbed the baby and walked away from the car, insisting that his wife follow him. (*Id.* at 215-216) The prosecution stated that Movant's wife's sisters forcibly took the baby from Movant, which enraged him. (*Id.*) Movant then hit his wife in the head, knocked her down, threatened to kill her, and dragged her into the countryside away from the car. (*Id.* at 216) Eventually, after Movant and his wife traveled for a prolonged period through the scrub they came to a paved road and nearby under a tree Movant assaulted his wife by strangling her, making her lie in a shallow depression they dug, threatening her and eventually forced himself on her by raping her both anally and vaginally. (*Id.* at 217-218) Although the police and Movant's wife's family searched the area for them that evening, they were unable to locate Movant and his wife. (*Id.*) The prosecution declared that Movant hitchhiked with his wife to a trailer where he had been staying and kept his wife there for most of the following day, until she convinced him to borrow a truck to take them to a store nearby to get some food. (*Id.* at 219) At the store, Movant's wife told the store manager she had been kidnapped and asked for help. (*Id.*) The store manager called the police and told Movant she had done so. (*Id.*) Movant took the borrowed truck and drove to Washington state for two weeks before returning to Kayenta where he went to the police station and spoke with police officers. (*Id.* at 220)

In its opening, the defense presented its version of events that it would establish. (*Id.* at 223-236) The defense stated that Movant and his wife struggled financially and that his wife often relied on her father for a place to live and for money. (*Id.* at 224) According to Movant, aside from financial struggles, the couple encountered conflict because Movant's wife's father strongly disapproved of their relationship, and because Movant's wife abused pain pills and alcohol. (*Id.*) Although Movant's wife had obtained protective orders against Movant, she continued to spend time with him. (*Id.* at 226-227) On October 4, 2015, when Movant arrived at his wife's sister's home, the defense argued that she and her sisters had been drinking alcohol. (*Id.* at 228) After driving into Kayenta and drinking more, Movant's wife had become "highly intoxicated." (*Id.* at 229) Movant's wife tossed the baby into Movant's lap in the car, and, disapproving of how the baby was being

handled, Movant exited the car with the baby and walked away. (*Id.*) Under the scenario described by the defense, after one of the sisters said she was going to call the police, Movant and his wife were afraid of the wife's exposure to child protection issues because she was intoxicated and had handled the baby roughly. (*Id.* at 229-230) Movant and his wife walked into the countryside to get away, during which time Movant's wife sprained her ankle and Movant at times carried his wife on his back. (*Id.* at 230) Because it was dark and there were intermittent thunderstorms, the two took shelter under a tree near a highway. (*Id.*) After several hours, they hitchhiked and obtained a ride first to Kayenta and then back to the camper trailer Movant was living in. (*Id.* at 232) Movant's wife was briefly alone in the truck with the driver but said nothing about having been kidnapped or assaulted. (*Id.*) The couple spent the day in the camper trailer sleeping, eating, drinking soda, watching movies on a DVD player, and having sex. (*Id.* at 233) At one point, Movant carried his wife to an outdoor shower and they encountered the trailer and property owner's son, but Movant's wife did not ask for help. (*Id.*) When Movant and his wife went to the nearby store, his wife advised the store manager she had been kidnapped by Movant and asked for help. (*Id.* at 234) Movant's wife called her father and the store manager called the police. (*Id.* at 234) After the police spoke to Movant's wife, her father drove her to the health clinic in Kayenta. (*Id.* at 234-235) The clinic tested her blood, which indicated she had alcohol in her system along with opiates and THC. (*Id.* at 235) The defense explained that a sexual assault examination of Movant's wife performed in Tuba City, Arizona did not indicate injuries to her anus or genitalia that could be consistent with her claims of forcible sex. (*Id.* at 235-236)

The jury found Movant guilty on all counts. (CR Doc. 105) On Count 2, the jury found Movant guilty of acting with intent to commit aggravated sexual abuse rather than acting with intent to commit murder. (*Id.* at 2) The Court subsequently sentenced Movant to 330 months' imprisonment and lifetime supervised release. (CR Docs. 157-158)

On direct appeal to the Ninth Circuit, Movant argued his convictions should be reversed because the Court abused its discretion by admitting prior act evidence under

Federal Rule of Evidence 404(b) and that the prosecution had committed plain error by impermissibly vouching for the veracity of Movant's wife's testimony, making statements that urged the jury to convict Movant for reasons not relevant to his guilt or innocence, arguing that Movant lied in his testimony, and suggesting to the jury that Movant's mother did not believe his version of the events. *United States v. Sloan*, 756 Fed.Appx. 739 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 198 (2019). The Ninth Circuit concluded that Movant had not identified any errors either singly or cumulatively and affirmed his convictions. *Id.* at 739-40.

II. MOVANT'S HABEAS GROUNDS

Movant asserts nineteen grounds for relief. (Doc. 5 at 5-84) Movant argues claims of ineffective assistance of counsel ("IAC") in Grounds 1 through 12 and 15 through 18. (Doc. 5 at 5-77, 80-83) Additionally, Movant raises claims of error by the Court, prosecutorial misconduct, and a freestanding claim of actual innocence in Grounds 13, 14, and 19, respectively. (*Id.* at 78, 79, 84) Respondent contends that all of Movant's claims fail on the merits and that the Court should deny the Motion. (Doc. 32 at 17-52)

The Response considers Movant's IAC grounds based on the issue presented rather than addressing each ground in order. (Doc. 32) Because Movant's discussion of his claims includes portions relevant to other claims within the Motion (*Id.* at 5-77, 80-83), undersigned also considers Movant's arguments organized by issue, although considering the issues in a somewhat different order than that of the Response.

III. STANDARD OF REVIEW

A. Motion Under 28 Under 28 U.S.C. § 2255

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the sentencing court to vacate, set aside, or correct his sentence where "the sentence was imposed in violation of the Constitution or the laws of the United States, or [where] the court was without jurisdiction to impose such a sentence, or [where] the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a).

B. Ineffective Assistance of Counsel

To qualify for relief pursuant to a claim of ineffective assistance of counsel ("IAC"), a movant must show both that counsel's representation fell below an objective standard of reasonableness and also that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). In reviewing counsel's performance, courts "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The standard for judging counsel's representation is "highly deferential." *Id.* It is "all too tempting" to "second guess counsel's assistance after conviction or adverse sentence." *Id.* "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

To establish prejudice, a movant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* The court need not reach both components of *Strickland.* 466 U.S. at 697 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

C. Standard for Warranting Evidentiary Hearing

Under 28 U.S.C. § 2255, a court shall grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ...." 28 U.S.C. § 2255(b). To state a claim for ineffective assistance of counsel

such that a movant would be entitled to an evidentiary hearing, a movant must allege facts showing that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

To show that he is entitled to an evidentiary hearing, a movant must allege "specific factual allegations that, if true, state a claim on which relief could be granted." *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (internal quotations and citations omitted). In determining whether to grant an evidentiary hearing, a court must consider whether, accepting the truth of a movant's factual assertions that are not directly and conclusively refuted by the record, the movant could prevail on his claims. *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002).

IV. DISCUSSION

A. Movant's Claims asserting IAC

1. IAC for failure to challenge aspects of his prosecution

As discussed below, Movant contends his trial counsel were ineffective when they failed to contest his prosecution based on principles of double jeopardy, lack of jurisdiction, protection against unreasonable search and seizure, probable cause, and the alleged unconstitutional application of the Indian Civil Rights Act ("ICRA").

a. Double jeopardy

In Ground 3, Movant claims his counsel were ineffective for failure to "raise a defense under [the] 'double jeopardy' clause of the Fifth Amendment" or to raise a defense "under multiplicity-multifarious." (Doc. 5 at 56) Movant's argument is that because he told his trial counsel that his wife's injuries were actually inflicted by her sister Marcella and not by Movant, counsel should have challenged the charges against Movant on the basis of double jeopardy and/or multiplicity because Marcella committed the crimes Movant was charged with. (*Id.*)

The Fifth Amendment provides that in criminal actions, no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The United States Supreme Court has instructed that the Double Jeopardy Clause "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Monge v. California*, 524 U.S. 721, 727-28 (1998). Although Movant correctly states that the Double Jeopardy Clause protects "against multiple punishments for the same offense" (*Id.* at 57), he does not argue that he was improperly charged and convicted of several crimes based on his own actions, but rather contends he was improperly charged and convicted based on Marcella's actions. A claim under the Double Jeopardy Clause does not apply to such circumstances.

Movant also suggests that his charged counts were multiplicitous. The Supreme Court has concluded that "[i]n both the multiple punishment and multiple prosecution contexts" the double jeopardy bar applies "where the two offenses for which the defendant is punished or tried cannot survive the [*Blockburger*] 'same-elements' test[.]" *United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The test announced in *Blockburger* applies to determine whether two statutory provisions prohibit the same offense and requires that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. The *Blockburger* test is premised on a '"rule of statutory construction,'" and will not control where "there is clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

The charges in each of Counts 1 through 6 of Movant's superseding indictment allege violation of 18 U.S.C. § 1153. (CR Doc. 40) Section 1153, the Major Crimes Act, permits the federal government to prosecute Indians in federal court for limited, enumerated offenses committed in Indian country. *United States v. Other Medicine*, 596 F.3d 677, 680 (9th Cir. 2010) (discussing the Major Crimes Act and noting that "Indian

country includes 'all land within the limits of any Indian reservation'") (quoting 18 U.S.C. § 1151(a)). Section 1153(a) requires that:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . kidnapping, . . . [and] a felony assault under section 113[2] . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153 (March 7, 2013). Movant's superseding indictment charged him with: (Count 1) Kidnapping violating 18 U.S.C. §§ 1153 and 1201; (Count 2) Assault with Intent to Commit Aggravated Sexual Abuse or with Intent to Commit Murder violating 18 U.S.C. §§ 1153 and 113(a)(1); (Count 3) Aggravated Sexual Abuse (vaginal) violating 18 U.S.C. §§ 1153, 2241(a)(1), and 2246; (Count 4) Aggravated Sexual Abuse (anal) violating 18 U.S.C. §§ 1153, 2241(a)(1), and 2246; (Count 5) Assault of a Spouse or Intimate Partner Resulting in Substantial Bodily Injury violating 18 U.S.C. §§ 1153 and 113(a)(7); and (Count 6) Assault of a Spouse or Intimate Partner by Strangling or Suffocating violating 18 U.S.C. §§ 1153 and 113(a)(8). (CR Doc. 40 at 1-3)

Each of Counts 1 through 6 required the prosecution to establish beyond a reasonable doubt that the charged offense took place on the Navajo Nation Indian Reservation and that Movant was an Indian at the time of the offense. (CR Doc. 102 at 17-20, 22) Accordingly, these elements are common to all of Counts 1 through 6.

Under Count 1, alleging Kidnapping, the prosecution was required to additionally establish beyond a reasonable doubt that Movant: (1) "kidnapped, seized, confined, abducted, or carried away [the victim] on or between October 4 and October 5, 2015"; and (2) "held [the victim] for ransom, reward, or other benefit[.]" (*Id.* at 102; 18 U.S.C. § 1201(a))

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[2] Title 18 U.S.C. § 113(a)(1) addresses assault with intent to commit murder or a violation of section 2241 (aggravated sexual abuse) or 2242 (sexual abuse), alleged in Counts 2, 3, and 4). Section 113(a)(7) identifies "assault resulting in substantial bodily injury to a spouse[,]" charged in Count 5. Section 113(a)(8) addresses "[a]ssault of a spouse . . . by strangling, suffocating, or attempting to strangle or suffocate[,]" charged in Count 6.

In Count 2, alleging Assault with Intent to Commit Murder or Aggravated Sexual Abuse, the prosecution was required to additionally establish that Movant "assaulted [the victim] by intentionally striking or wounding her or by intentionally using a display of force that reasonably caused her to fear immediate bodily harm on or between October 4 and October 5, 2015"; and that Movant "did so with the intent to commit murder or aggravated sexual abuse[.]"[3] (CR Doc. 102 at 18; 18 U.S.C. § 113(a)(1))

Count 3, alleging Aggravated Sexual Abuse involving the victim's vulva, in addition to requiring the prosecution to establish that the charged offense occurred on the Navajo Nation and that Movant was an Indian at the time of the offense, also mandated that the prosecution prove that Movant "knowingly used force, threatened, or placed [the victim] in fear that she would be subjected to death, serious bodily injury, or kidnapped to cause her to engage in a sexual act on or before October 4 and October 5, 2015" and that the sexual act meant "contact between the [Movant's] penis and [the victim's] vulva, upon penetration, however slight." (CR Doc. 102 at 19; 18 U.S.C. § 2241(a))

In Count 4, alleging Aggravated Sexual Abuse involving the victim's anus, the prosecution was additionally required to prove that Movant "knowingly used force, threatened, or placed [the victim] in fear that she would be subjected to death, serious bodily injury, or kidnapped to cause her to engage in a sexual act on or before October 4 and October 5, 2015" and that the sexual act meant "contact between the [Movant's] penis and [the victim's] anus, upon penetration, however slight." (CR Doc. 102 at 19; 18 U.S.C. § 2241(a))

Under Count 5, alleging Assault Resulting in Substantial Bodily Injury, in addition to the elements establishing the charged conduct occurred on the Navajo Nation and that Movant was an Indian, the prosecution was required to establish that: (1) "the [Movant] assaulted [the victim] by intentionally or knowingly striking or wounding her on or

[3] The jury instruction on Count 2 required that if the jury found Movant guilty of the charge all jurors had to agree on which of either murder or aggravated sexual abuse Movant intended to commit. (CR Doc. 102 at 18) The jury found Movant guilty of intent to commit aggravated sexual abuse. (CR Doc. 105 at 2)

between October 4 and October 5, 2015"; (2) "as a result, [the victim] suffered substantial bodily injury"; and (3) the victim "was a spouse, intimate partner, or dating partner of the [Movant]."[4] (CR Doc. 102 at 20; 18 U.S.C. § 113(a)(7))

Count 6 of the superseding indictment charged Movant with Assault by Strangling and Attempted Assault by Strangling.[5] The jury was instructed that "[i]n order for the [Movant] to be found guilty of this charge, the government must prove either (1) each of the elements of assault by strangling beyond a reasonable doubt or (2) each of the elements of attempted assault by strangling beyond a reasonable doubt." (CR Doc. 102 at 22) The additional elements in the charge of assault by strangling were: (1) the Movant "intentionally or knowingly assaulted [the victim] by strangling her on or between October 4 and October 5, 2015"; and (2) the victim "was the spouse, intimate partner, or dating partner of the [Movant][.]" (*Id.*, 18 U.S.C. § 113(a)(8) The additional elements in the charge of attempted assault by strangling were: (1) the Movant "intended to strangle [the victim] on or between October 4 and October 5, 2015"; (2) the Movant "did something that was a substantial step toward committing the crime"; and (3) the victim "was a spouse, intimate partner, or dating partner of the [Movant][.]" (*Id.*)

Each charge in Counts 1 through 6 is not multiplicitous to any of the other charges because each count requires proof of an element that the other counts do not. *Blockburger,* 284 U.S. at 304.

In light of the conclusions that Movant fails to raise a claim of Double Jeopardy and that Movant's charges were not multiplicitous, Movant has failed to establish either that his trial counsel's representation fell below an objective standard of reasonableness or prejudiced his defense. *Strickland*, 466 U.S. at 687.

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[4] On Count 5, the jury was instructed on the lesser included offense of assault by striking, beating or wounding. (CR Doc. 102 at 21) The jury found Movant guilty on the greater charge of assault resulting in substantial bodily injury. (CR Doc. 105 at 3)

[5] On Count 6, the jury was instructed on the lesser included offense of assault by striking, beating or wounding. (CR Doc. 102 at 24) The jury found Movant guilty on the greater charge of assault by strangling. (CR Doc. 105 at 3)

b. Lack of jurisdiction

Movant's Ground 4 claim is that his trial counsel provided ineffective assistance when they stipulated to Movant's quantum of Indian blood, thereby waiving Movant's ability to challenge the Court's jurisdiction over him or the subject matter at issue. (Doc. 5 at 59) In his Reply, Movant asserts that trial counsel should have moved for dismissal of the indictment for lack of jurisdiction. (Doc. 40 at 38)

Because Movant was charged pursuant to the Indian Major Crimes Act ("IMCA"), 18 U.S.C. § 1153 requires the United States to establish that a defendant is an Indian "within the meaning of that statute." *United States v. Zepeda*, 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc). In *Zepeda*, the Ninth Circuit clarified that "to prove Indian status under the IMCA, the government must prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, a federally recognized tribe." *Id.* at 1106-07. Prior to trial, the parties filed a joint stipulation specifying that at the time of the events of October 4 and 5, 2015, Movant "had some quantum of Indian blood from the Navajo Nation Indian [T]ribe" and "was a member of or affiliated with the Navajo Nation Indian Tribe[.]" (CR Doc. 59 at 1-2) The parties further stipulated that the Navajo Nation Indian Tribe was a federally recognized tribe at the time of the alleged offenses and that Movant "was and remains an enrolled member of that tribe." (*Id.*)

In a declaration attached to the United States' Response, Movant's trial counsel Susan Anderson explained that Movant was consulted about the decision to stipulate to his status as an Indian pursuant to the IMCA and that Movant agreed with the decision. (Doc. 32-1 at 8, ¶ 18) Ms. Anderson declared that she advised Movant to agree to the stipulation "based on the government's warning that they would seek to prove Indian Status by showing [Movant] had subjected himself to tribal jurisdiction in the past in criminal matters and protection order matters" and that a stipulation would avoid the risk that this prejudicial evidence could be introduced at trial. (*Id.*) Respondent indicates that the decision to stipulate to Movant's status as an Indian pursuant to the IMCA was based on strategy and was not ineffective assistance. (Doc. 32 at 27) In *Strickland*, the Supreme Court concluded

that informed strategic choices by counsel based on professional judgment are owed deference. 466 U.S. at 681.

Undersigned concludes that defense counsel's agreement to stipulate to Movant's Indian status and counsel's advice to Movant in this regard represented a reasonable informed strategic choice. Movant does not contend he was not a member of the Navajo Nation Indian Tribe or that he did not qualify as an "Indian" under the IMCA. (Doc. 5 at 59, Doc. 40 at 38) Under the circumstances presented, Movant fails to establish that his trial counsel's representation fell below an objective standard of reasonableness or that it prejudiced his defense. *Strickland*, 466 U.S. at 687.

Additionally, in a late filing outside of the Court's briefing schedule and beyond the issues raised in the Petition and Supplement, Petitioner contends that the Court lacked subject matter jurisdiction because some of the offenses occurred within a state roadway right-of-way rather than in Indian Country and that the State of Arizona had jurisdiction over actions occurring within the Highway 160 right-of-way. (Doc. 50) Movant's argument is incorrect. In *United States v. High Elk*, the Eighth Circuit rejected an Indian appellant's argument that the federal courts lacked jurisdiction over a crime charged under the IMCA, committed by the appellant against another Indian on a section of South Dakota Highway 63 running through the Cheyenne River Indian Reservation. 902 F.2d 660, 661 (8th Cir. 1990). The appellant argued that the state had assumed exclusive jurisdiction over highways on Indian land under Public Law ("P.L.") 280 which allowed states to assume jurisdiction over Indian land within their boundaries[.]" *Id.* The Eighth Circuit concluded there was no authority holding that federal courts lacked jurisdiction under the IMCA in states like South Dakota that had assumed jurisdiction under P.L. 280. *Id.* That conclusion holds with even greater force here because Arizona has not adopted P.L. 280. *State v. Zaman*, 194 Ariz. 442, 445, 984 P.2d 528, 531 (1999) (Feldman, J., dissenting); *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993).

c. Unreasonable search and seizure lacking probable cause

In Ground 6, Movant argues his trial counsel were ineffective by failing to

investigate and challenge the warrantless search and seizure of the victim's blood-stained clothing. (Doc. 5 at 68-69) Movant contends that the victim advised a Navajo Nation Police Department investigator that clothing she was wearing during the offenses remained in the trailer Movant was staying in but falsely stated that the clothing was stained with her blood. (Doc. 40 at 39) Movant asserts the clothing was improperly seized without a warrant. Similarly, in Ground 8, Movant contends that defense counsel provided IAC when they failed to investigate and challenge the transfer of the blood-stained clothing from the Navajo Nation Police Department to FBI Special Agent Sutherland. (Doc. 5 at 71)

Navajo Nation Police Department criminal investigator Gillis testified that on October 5, 2015, he and another officer went to the camper trailer owned by Al Chester and parked on Chester's property that Movant had briefly occupied to search for the victim's orange tank top and blue jeans which the victim had told Gillis contained blood stains. (CR Doc. 180 at 236, RT 9/08/2016) Gillis testified he was unable to gain access to the trailer. (*Id.*) Inspector Gillis said Mr. Chester was present but did not have a key to open the trailer. (*Id.* at 238) When Inspector Gillis returned the next day, Mr. Chester gave him permission to search the trailer and Inspector Gillis took the victim's clothes into evidence. (*Id.* at 239-240) At this time Movant had taken Mr. Chester's truck and his location was then unknown.

Al Chester testified that he let Movant stay in Chester's small camper trailer located on his property near his residence. (CR Doc. 181 at 115-116, RT 9/09/2016) Mr. Chester explained that he sometimes used the trailer when he worked as an electrician on jobs away from home. (*Id.*) Mr. Chester stated that he allowed Movant to stay in the trailer while Movant worked on an engine belonging to Chester. (*Id.* at 115) Mr. Chester said the Movant stayed on his property "off and on for about a week." (*Id.*) Mr. Chester explained that he stored personal work items in the trailer, including a cooler, his toolbox, and a chainsaw, which he left in the trailer during the time he allowed Movant to "spend his time there." (*Id.* at 121-122) Movant testified that during the short time he used Al Chester's camper trailer that Movant's wife went "there all the time" and that "the door's always

open to my wife." (CR Doc. 124 at 45)

Movant argues that the warrantless search and seizure of the victim's blood-stained clothing violated his Fourth Amendment rights and that his trial counsel's failure to challenge the search and seizure was ineffective assistance because "there exists more than a reasonable probability that the result of the proceedings would have been different[.]" (Doc. 40 at 39) Movant fails to explain how the seizure and use at trial of the victim's bloodstained clothing would likely have altered the outcome of his trial.

Respondent summarily states that Movant's claim is without merit because the search was lawful. (Doc. 32 at 27-28) Undersigned concludes that the search was lawful because Mr. Chester possessed the authority to consent to the warrantless search. *See United States v. Matlock*, 415 U.S. 164, 170-71 (1974) ("when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."); *United States v. Yarbrough*, 852 F.2d 1522, 1534 (9th Cir. 1988) (finding third party had actual authority to consent to warrantless search of a shack when the third party owned the shack and surrounding property, kept some of his personal property in the shack, and had access to a hidden key to a padlock used to lock a room within the shack).

Moreover, even if Mr. Chester had not had the authority to consent, the circumstances in this case support the conclusion that Inspector Gillis had a reasonable belief in Chester's apparent authority to consent to the search. *See United States v. Arreguin*, 735 F.3d 1168, 1174-75 (9th Cir. 2013) ("'Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent.'") (quoting *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993) overruled on other grounds by *United States v. Kim*, 105 F.3d 1579, 1580-81 (9th Cir. 1997)).

Accordingly, because the warrantless search for and seizure of the victim's clothing from Mr. Chester's trailer was lawful, Movant's trial counsel did not provide IAC under *Strickland* either by not moving to suppress the victim's bloodstained clothing or not challenging the transfer of the clothing from the Navajo Nation Police Department to FBI Special Agent Sutherland.

d. Application of the ICRA

Under Ground 12, Movant alleges his trial counsel provided IAC by failing to move to challenge the constitutionality of the ICRA. (Doc. 5 at 76-77, Doc. 40 at 45) Movant states that the ICRA is unconstitutional because it deprives all United States Native American citizens charged with misdemeanors of the right to counsel in tribal courts. (Doc. 5 at 76) Movant argues that his "uncounseled conviction derived under § 1302(a)(6) [prejudiced him] before and during trial and at sentencing." (*Id.*) Movant does not specifically identify any convictions in tribal court that were unconstitutional. Furthermore, this § 2255 Motion is not the proper vehicle in which to raise a claim of unconstitutionality of the ICRA. Rather, a petition for writ of habeas corpus to challenge an order of detention by an Indian tribe is available in federal court pursuant to 25 U.S.C. § 1303. *See United States v. Bryant*, __ U.S. __, 136 S.Ct. 1954, 1966 (2016) (also rejecting the argument that a defendant's uncounseled tribal-court convictions should not be used as predicate offenses in federal prosecution). In light of these circumstances, Movant fails to establish his trial counsel provided IAC by not challenging the ICRA's constitutionality.

2. IAC by failing to challenge Movant's detention and bail hearing

In Ground 9, Movant asserts his trial counsel were ineffective when they "failed to investigate and challenge [Movant's] bail hearing and decision" or to "file for a bail rehearing or reconsideration for a 2nd bail hearing based [on] fraud on the court with false claims." (Doc. 5 at 72) Movant argues his trial counsel should have challenged his detention and bail hearing because the prosecution falsely argued Movant was a potential

risk of danger under 18 U.S.C. § 16(b)[6] which was later ruled unconstitutional, his bail was denied based on "wholly fabricated charged crimes[,]" and his detention prevented him from establishing his innocence by recovering exculpatory evidence that was subsequently lost. (*Id.*) In his Reply, Movant indicates such evidence would have included the victim's underwear, a cell phone, and missing witnesses. (Doc. 40 at 43)

During Movant's October 2015 detention hearing, undersigned found beyond a preponderance of the evidence that Movant was a flight risk based on Movant's personal and criminal history, his past drug and alcohol use, and his previous use of an alias. (CR Doc. 171 at 9-10) Significantly, undersigned emphasized that Movant's history included failure to appear to mandatory court hearings on numerous occasions and stated that if Movant had failed to appear regarding minor charges, it was doubtful he would be more inclined to appear when facing multiple life sentences to which he could have been exposed. (*Id.*) Undersigned specifically noted Movant's criminal history of multiple violent offenses set forth in Movant's Pretrial Services Report (CR Doc. 7), among them convictions: in 1996 on a charge of aggravated assault with a weapon; in April 2005 on an assault with a deadly weapon charge; and twice in 2005 on charges of battery. (*Id.* at 10-11) Undersigned also found by clear and convincing evidence that Movant was a danger to the victim in this case and to the community at large. (*Id.*)

Movant's trial counsel's declaration explains that counsel did not pursue revocation of the order detaining Movant pending trial because she did not "believe that revisiting his detention hearing would be fruitful" and because Movant did not request it. (Doc. 32-1 at 4, ¶ 7) Counsel further stated that months later in July 2016, Movant asked her about possibly filing a motion for bond or release to a halfway house, but said this request was of the least importance regarding motions he wanted her to file. (*Id.*) Counsel attested she declined to file a motion to reopen the detention issue "because there were not changed

[6] Title 18 U.S.C. § 16 defines the term "crime of violence" as either (a) "an offense that has as an element the use, attempted use, or threatened use of physical force against a person or property of another" or (b) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offence." 18 U.S.C. § 16.

circumstances to warrant it." (*Id.*)

In Movant's October 2015 detention hearing, undersigned did not specifically refer to or rely on 18 U.S.C. § 16(b) in addressing Movant's history of violent offenses. (CR Doc. 171, RT 10/28/2015) Regarding Movant's history of assault with a deadly weapon convictions and his battery conviction, reference to § 16(b) would have been unnecessary because the elements of such crimes would fall within the definition of a crime of violence under § 16(a) as "an offense that has as an element the use, attempted use, or threatened use of physical force against a person or property of another[.]" 18 U.S.C. § 16(b).

Undersigned relied on the factors set forth in 18 U.S.C. § 3142(g) to determine there were no release conditions that would reasonably assure Movant's appearance and protect the safety of other persons and the community at large. (*Id.* at 9-11) Movant does not establish that any circumstances in his case changed that would have provided a basis for his trial counsel to move to revoke his detention order. Although Movant states that had he not been detained prior to trial he may have obtained evidence such as the victim's underwear, a cell phone, and missing witnesses, he provides no basis on which the Court could conclude that such evidence would have resulted in the discovery of any new evidence or any evidence that reasonably would have affected the outcome of the trial.

Movant fails to establish either: (1) that his trial counsel's performance fell below an objective standard of reasonableness when they failed to assert an argument based on 18 U.S.C. § 16(b) in a motion to revoke detention; or (2) that such performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Prejudice is found where "there is a reasonable probability that, but for counsel' unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. Movant has not explained how his trial counsel's strategic decision to not move to revoke his detention was wrong, or that no reasonable attorney would have made the same decision, or that the decision prejudiced Movant's case.

3. IAC re Batson

Movant's Ground 18 claim is that his trial counsel provided IAC regarding jury selection by failing to object to or otherwise challenge the jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Flowers v. Mississippi*, __U.S.__, 139 S.Ct. 2228 (2019) when the prosecution "struck at least one Native American juror who was similarly situated, to at least, one white juror who was not struck by the state." (Doc. 5 at 83) Movant complains that by not objecting to the *Batson* violation his counsel permitted the prosecution to obtain an all-white jury, thus depriving him of a fair trial. (*Id.*, Doc. 40 at 48) Movant states that "[b]oth [a] white and Native American juror were using the same kind of court approved hearing aid device, that make the same 'clicking noise.'" (Doc. 5 at 83) In his Reply, Movant asserts that his trial counsel "failed to challenge the preemptory strikes under Batson, to prevent prosecution from unconstitutionally obtaining an ideally 'all white jury.'" (Doc. 40 at 48, underlining in original) Similarly, Movant suggests that "[a] close review of the record will show prosecution excluded similarly situated Native American jurists to achieve his ideally all white jury." (*Id.*)

During voir dire of the jury pool, Juror 15 advised the Court he had a problem hearing. (CR Doc. 178 at 62) The following conversation ensued between the juror and the Court:

> PROSPECTIVE JUROR 15: I have a hard time hearing so a lot of the time I'm confused when people talk to me.
>
> THE COURT: We have some hearing aids that will help you.
>
> Does anyone else have trouble hearing that would again benefit from a hearing aid?
>
> Try this and see if it helps.
>
> Does that help?
>
> Is that yes?
>
> PROSPECTIVE JUROR 15: Yes.
>
> THE COURT: All right. Thank you.

Is there something else that you wanted to tell me, 15?

PROSPECTIVE JUROR 15: It's just that even with my hearing aid, there's a lot of background coming in that -- the air conditioner, the people who speak. So I can't hear right. I can't come in here and hear.

THE COURT: Okay. When I say something and you don't – someone says something and you don't hear, would you let us know and we'll repeat it? Does that help?

PROSPECTIVE JUROR 15: Yeah.

THE COURT: Okay. Thank you. Just let us know.

A short time later, one of the prosecutors advised the Court during a sidebar conference:

PROSECUTOR SEXTON: And then, Your Honor, I don't know that the man with the hearing aids – his hearing aids are going off like crickets over there. We don't have an objection to him being excused. I don't know if the defense does.

PROSECUTOR SAMUELS: They're maybe distracting a couple other jurors over there because they're pretty noisy.

DEFENSE COUNSEL ANDERSON: We don't want him excused if there's a way to solve the problem.

THE COURT: I don't – there's no way to solve the problem. He's got a hearing aid and it sounds like crickets, I guess. He's got it turned up. Do you object to letting him go? Because it sounds like it's going to be happening throughout –

DEFENSE COUNSEL ANDERSON: If it can't be solved then we don't object.

THE COURT: Okay. Thanks. I'm telling you right now, I don't have a way to solve it. I'm not a scientist.

(End of discussion at sidebar)

(*Id.* at 66-67) Subsequently, the Court addressed Prospective Juror 15:

> THE COURT: Excuse me. I'm sorry, sir. 15.
>
> Okay. You've got a hearing aid and it sounds like it's causing a little extra background noise.
>
> PROSPECTIVE JUROR 15: Yeah.
>
> THE COURT: I'm not sure we can really fix that so I'm going to allow you to be excused. Thank you for coming and thank you for being willing to participate.

(*Id.* at 68-69) After all of the jurors were questioned, the Court advised defense counsel Anderson that once each side had made their peremptory strikes she should timely make any *Batson* challenge. (*Id.* at 191-192) Defense counsel did not assert a *Batson* challenge. (*Id.* at 194)

In *Flowers*, the United States Supreme Court held that under the "extraordinary facts" of the underlying state criminal case, the trial court "committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was 'not motivated in substantial part by discriminatory intent.'" 139 S.Ct. at 2235. The defendant had been tried six separate times before juries for murder with the same lead prosecutor each time. *Id.* at 2234. The defendant was convicted in the initial three trials but the Mississippi Supreme Court reversed each time for prosecutorial misconduct or error. *Id.* at 2235. The fourth and fifth trials resulted in hung juries and mistrial, and the defendant was convicted in the sixth trial, which the state supreme court affirmed on appeal. *Id.* The Supreme Court granted certiorari on the defendant's claim that the prosecution's peremptory strikes of five of six black prospective jurors violated *Batson* and reversed the defendant's sixth conviction. *Id.*

The Supreme Court concluded that four "critical facts, taken together, require reversal." *Id.* These critical facts were: (1) in six trials the prosecution used its allotted peremptory challenges to strike 41 of 42 black prospective jurors; (2) in the sixth trial the prosecution used peremptory strikes on 5 of 6 such jurors; (3) in the sixth trial, the

prosecution employed "dramatically disparate questioning of black and white prospective jurors" in an "apparent effort to find pretextual reasons to strike black prospective jurors"; and (4) the prosecution then struck "at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State." *Id.* The Supreme Court detailed the history of its jurisprudence addressing a defendant's Equal Protection Clause rights regarding jury selection and noted that in *Batson* it had held that "a criminal defendant could show 'purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges[.]'" 139 S.Ct. at 2241 (quoting *Batson*, 476 U.S. at 96). The Court further observed that in *Batson* it had stressed that pursuant to the Equal Protection Clause of the Fourteenth Amendment "even a single instance of race discrimination against a prospective juror is impermissible." *Id.* at 2242. Addressing the facts presented in *Flowers*, the Supreme Court concluded the evidence suggested that over the defendant's six trials, the prosecution "wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury." *Id.* at 2246.

A court has discretion to decide whether to excuse a juror for cause. 28 U.S.C. § 1865(b)(4). Section 1865(b)(4) provides that a district court judge will "deem any person qualified to serve on grand and petit juries" unless the potential juror "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service[.]" 28 U.S.C. § 1865(b)(4). Considering the propriety of a district court decision to dismiss a prospective juror who said that due to medication he would need to use the facilities at least every hour, the Fifth Circuit concluded that "it is proper for a court to dismiss prospective jurors based on their infirmities if those infirmities render them unable to perform satisfactory service." *United States v. Snarr*, 704 F.3d 368, 383-84 (5th Cir. 2013) (citing § 1865(b)(4)).

Movant alleges that Juror 15 was a Native American prospective juror who was dismissed for using a hearing aid that made a distracting noise while another prospective juror, who was white, also used a hearing aid that made the same noise and was not dismissed. (Doc. 5 at 83) This allegation is not supported by the record, which includes no

mention of a white prospective juror who was provided by the Court with hearing aids that made noise. (CR Doc. 178 at 47-196) Further, as the above-quoted transcript portion indicates, Juror 15 brought his hearing disability to the attention of the Court, suggesting he would not be able to hear at trial, and the Court only excused him for cause after providing him with court-owned hearing aids and after the hearing aids were determined to be irreparably disruptive.

Movant additionally argues that his trial counsel provided ineffective assistance because they did not challenge preemptory strikes that resulted in an all-white jury. (Docs. 5 at 83, 40 at 48) The Supreme Court instructs that:

> *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:
>
> > '"First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'"

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (quoting *Miller–El v. Dretke*, 545 U.S. 231, 277 (2005) (THOMAS, J., dissenting) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 328-329 (2003))). Movant refers to no record evidence that would have supported the first step of the process, that is that any peremptory challenge made by the prosecution was exercised on the basis of race. Moreover, the transcript of the jury selection process does not contain such evidence.

Under the facts presented in Movant's case neither *Batson* nor *Flowers* would apply and defense counsel were not ineffective for failing to challenge the Court's jury selection. Accordingly, Movant has failed to establish that his trial counsel's representation regarding jury selection either fell below an objective standard of reasonableness or amounted to deficient performance that prejudiced his defense.

4. IAC for failure to investigate footprint evidence

Movant argues his defense counsel were ineffective by failing to investigate the crime scenes for footprints before weather conditions such as wind, rain, or snow effectively erased the prints, and that this failure caused the loss of important exculpatory evidence. (Doc. 5 at 8-9) Movant asserts that footprints near Marcella's car would have established "Movant as the real victim and Marcella as the attacker and perpetrator against Movant, [Movant's and the victim's baby], and [the victim]." (Doc. 5 at 8)

The victim's sister Melinda testified that after they pulled off the side of the road, Movant hit the victim with a closed fist and knocked her down. (CR Doc. 180 at 31) Melinda stated that Movant took his and the victim's baby from the victim and walked away quickly. (*Id.* at 32) Melinda declared that she ran after Movant and feared for the baby's safety, particularly when Movant was handling the baby roughly and began to choke him. (*Id.* at 33-34) Melinda further testified that she kicked Movant in the genitals twice, after which Movant loosened his grip on the child. (*Id.* at 34-35) Melinda stated that in the process of trying to get the baby from Movant, she and her sister Marcella tore off Movant's shirts. (*Id.* at 40)

Movant testified instead that when the car pulled over off the road, while still in the vehicle, the victim slung their baby into Movant's arms. (CR Doc. 123 at 48-49, RT 9/13/2016) Movant said he walked off some distance from the car and Melinda followed him. (*Id.* at 49) Movant declared that he then walked back near the car. (*Id.* at 52) Movant described that Marcella suddenly attacked him, choked him, and tore off his shirts, all while he was holding the baby. (*Id.* at 55) Movant stated that while Marcella continued to attack him, he handed the baby to Melinda, and at that point Marcella ran to the car. (*Id.* at 59)

Navajo Nation police officer Sergeant Byron Coolie testified that when he first arrived at the scene where Marcella's car was located, there "were a number of family members there" who wanted to search for the victim and were calling out for her. (CR Doc. 179 at 24, RT 9/07/2016) Sergeant Coolie stated that while he was searching for possible footprints of Movant and the victim leading away from Marcella's car, he observed

footprints around the car that he concluded "would be possibly from family members who were searching in the area." (*Id.* at 26) Sergeant Coolie found boot tracks at some distance from the car leading out in the direction that one of the witnesses told him Movant and the victim were last seen. (*Id.* at 26-27) Coolie explained that further on he also noticed an accompanying set of footprints that appeared to belong to a female wearing socks. (*Id.* at 28-29) Sergeant Coolie testified that the tracks would disappear sporadically due to hardness of the ground and vegetation. (*Id.* at 29-30) Sergeant Coolie stated that he was able to follow the tracks up to a highway and searched in the area next to the highway for 10 to 15 minutes, but stopped searching because there was lightning and it was beginning to rain. (*Id.* at 36) On cross-examination of Sergeant Coolie, Coolie verified he saw no evidence of one person dragging another person, but only "two people walking." (*Id.* at 41-42)

Navajo Nation police officer Newell Mann testified he was the first officer to arrive at the scene near Marcella's car. (CR Doc. at 180) Officer Mann estimated there were between 5 and 10 friends and members of the victim's family at the scene looking for the victim while he was there. (CR Doc. 180 at 155) The officer said he initially tried to find "tracks around the vehicle" but that the footprints "all ended up being the people that were there." (*Id.* at 156) On cross-examination by defense counsel, Officer Mann indicated he did not return to the area where Marcella's car was located the next day during daylight to take photographs of "footprints that might have remained[]" or "signs of a struggle that might have occurred." (*Id.* at 167) According to Officer Mann, when he arrived at the scene at 8:45 p.m., it had been approximately an hour and a half since Movant and the victim had left. (*Id.* at 167-168) The officer confirmed that later during the night of October 4 and 5, 2015, it had rained. (*Id.* at 173)

In her declaration, Ms. Anderson stated she had doubted the persuasive evidentiary value of footprints at the crime scene, particularly in view of the passage of many months and the fact that other people had "passed through the scene in the aftermath of the alleged assault[.]" (Doc. 32-1 at 6, ¶ 14) Ms. Anderson explained that by the time she was

appointed to represent Movant on October 30, 2015 (CR Doc. 13), the scene was several weeks old, "several more weeks would pass before [she] received discovery and heard [Movant] mention footprints and their perceived significance for the first time." (*Id.* at 7, ¶ 14) She explained that when she received the exact GPS coordinates from the government, she and the defense investigator were able to acquire value for trial preparation from inspecting the area of the scene of the events, but said there was "no useful footprint evidence." (*Id.*)

In *Strickland*, the Supreme Court instructed that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691. Ms. Anderson's determination that the passing of time, the winter weather, the absence of a precise location, and the passage of many other people through the crime scene following the assault would make the evidentiary value of footprints at the crime scene doubtful was a reasonable strategic choice. Although Movant argues that his version of the events on October 4, 2015, could have been established through documentation of footprint evidence (Doc. 5 at 46), his reliance on this possibility is likely misplaced. Officer Mann testified that within an hour and a half of the events surrounding Marcella's car, the only recognizable footprints around the car were those of the people present when Mann arrived at the scene. (CR Doc. 180 at 156) Further, Officer Mann testified, consistent with Movant's own statements, that it rained at the crime scenes during the night of October 4, 2015. (*Id.* at 173)

Movant has failed to show either that his defense counsel's representation regarding investigation of the scene for footprint evidence either fell below an objective standard of reasonableness or amounted to deficient performance that prejudiced his defense.

5. IAC due to failure to test blood or hire a blood expert

In Ground 1, Movant argues that defense counsel were ineffective for not presenting evidence showing that the blood on the victim's clothing was not her blood, but rather

Movant's blood from a cut on his wrist suffered when he was helping the victim cross a barbed wire fence. (Doc. 5 at 39-44) In Ground 2, Movant further asserts that his defense counsel provided IAC when they failed to test the blood stains for DNA and did not hire a blood DNA expert to testify on the results of such tests. (*Id.* at 47-48)

The victim testified that after her trek with Movant through the brush, her body felt "beat up[,]" and that she "couldn't even walk[,]" that her head hurt, and that she was bruised and "[c]overed in blood[,]" although she didn't know from where on her body she was bleeding. (CR Doc. 140 at 33) The victim identified blood on the pants she was wearing on October 4, 2015, as her blood. (*Id.* at 63) In closing arguments, the defense asserted that the blood observed on the victim's clothing was Movant's and not the victim's, but argued that even if the blood were the victim's there was only "a very small amount" and that the victim "was not covered in blood from anything that happened that day." (CR Doc. 134 at 60) In the prosecution closing, the prosecutor indicated that the victim thought the stains on her clothing was her blood, although she did not know where the blood had come from, and contended that the victim's conclusion the blood was hers was reasonable "given the pounding that she had just taken." (*Id.* at 85) Importantly, neither party relied in closing argument on the blood stains located on the victim's clothing in any significant way to support their theory of the case. (*Id.* at 3-88)

In her declaration, defense counsel Anderson asserts that the defense had concluded they were able to "make all the necessary arguments without blood typing or DNA analysis of the stains on the alleged victim's clothing and that this evidence mattered very little given the independent evidence showing physical injuries on her face and body." (Doc. 32-1 at 6, ¶ 13)

The trial record supports Ms. Anderson's conclusion that whose blood was on the victim's clothing was not a determinative issue in Movant's conviction. In fact, the Court came to this conclusion after trial when addressing Movant's March 31, 2017, Motion for DNA Analysis in which Movant argued that if testing indicated the blood stains on the victim's clothing were consistent with Movant's blood, "a compelling case will be made

that there is a strong possibility that the verdict and impending sentences would have been more favorable if the DNA results had been presented at trial." (CR Doc. 125 at 1) In its order denying the Motion, the Court noted that neither party had presented evidence or argued that "there was significant bleeding." (CR Doc. 139 at 2) The Court concluded that because Movant had "testified about substantial physical and sexual contact between him and the victim . . . [,] [w]here or from whom the stains originated would not be meaningful on any issue, guilt or mitigation." (*Id.*)

For the above-stated reasons, defense counsel's decision to not DNA test the blood stains on the victim's clothing and to not retain a DNA expert to opine about the blood stains was a reasonable strategic decision pursuant to *Strickland*, 466 U.S. at 691.

6. IAC for failure to put on evidence of the victim's father's alleged attempt to murder Movant

In Ground 1, Movant contends in part that his defense counsel were ineffective for refusing to investigate or put on evidence of the Movant's "exculpatory side of the story" including that the victim's father had tried to murder Movant through a booby-trapped Dodge minivan. (Doc. 5 at 10-12) Movant further alleges the victim's father had unsuccessfully conspired to have him "arrested and falsely imprisoned, even if the Movant was not guilty of anything." (*Id.* at 12)

Although defense counsel did not question Movant at trial about the specifics of Movant's claims that the victim's father had tried to murder him through a booby-trapped vehicle and planned to somehow have him falsely arrested and convicted, counsel strategically did cross-examine the prosecution's witnesses about the victim's father's disapproval of Movant and his desire to keep his daughter away from Movant. (CR Doc. 180 at 51-53 (cross-examination of the victim's sister Melinda); CR Doc. 140 at 108-110, 114 (cross-examination of the victim)) When Movant began to describe allegations that the victim's father had tried to kill Movant by booby-trapping a vehicle[7], defense counsel

[7] When Movant was asked on cross-examination whether he had told Special Agent

instead focused Movant's testimony on relevant reasons why he thought the victim's father disapproved of Movant's relationship with the victim, and the victim's practice of spending time with Movant despite her father's strong and outspoken disapproval, evidence that was directly related to the defense strategy to establish the victim's motivation to lie. (CR Doc. 123 at 124-129, Doc. 32-1 at 11, ¶ 24) Defense counsel's approach reasonably and strategically focused on evidence that was corroborated by multiple witnesses, such as the enmity the victim's father had for Movant and the impact this might have on the witnesses' motivation to fabricate, rather than on Movant's uncorroborated claim that the victim's father had attempted to kill him by sabotaging a vehicle.

Movant fails to establish either that his trial counsel's representation was not objectively reasonable or that he was prejudiced by counsel's decision to not emphasize Movant's claims that the victim's father wanted to kill him and conspired to have Movant arrested.

7. IAC for failure to introduce evidence of the victim's and her sisters' motives to lie

Under Ground 1, Movant argues that defense counsel failed to investigate for and introduce evidence on the victim's motives to lie. (Doc. 5 at 16) Movant states that under his version of events, the victim and her sisters should have been subject to prosecution for such crimes as assault, child abuse, kidnapping, drug crimes, public intoxication, and driving under the influence, and thus were motivated to lie to avoid prosecution. (Doc. 5 at 16, 18) The record does not support this complaint, but instead amply demonstrates that defense counsel prominently featured the victim's motives to lie in the defense case.

Based on witness testimony, in closing argument the defense emphasized the victim's financial and stability interests in maintaining a good relationship with her father, even while she repeatedly secretly saw Movant behind her father's back. (CR Doc. 134 at 36-37) Defense counsel argued that Movant's testimony that the victim did not want the

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Sutherland during their interview that the victim's father had been trying to kill him, Movant said that he believed he had mentioned it "in some roundabout way" "somewhere, someplace at sometime." (CR Doc. 124 at 54-55, RT 9/14/2016)

police involved on the night of October 4, 2015, was understandable because she had punched Movant in the face, slung the baby at Movant, and was intoxicated on pills and alcohol. (*Id.* at 58-59) Defense counsel stated that the victim must have understood that under those circumstances, she would have been facing possible legal trouble and, more significantly, trouble with child protective services. (*Id.* at 59) Counsel declared to the jury that the victim and her sisters had "powerful motivations to hide the truth," including that they all knew their father was against Movant and the victim being together and none of them wanted their father to be upset with them. (*Id.* at 69-70) Counsel suggested that the victim's sisters not only wished to stay in their father's good graces but also wanted to avoid any involvement with child protection services. (*Id.* at 70) Counsel further emphasized that the victim had not had any qualms about making Movant the fall guy in the past when she obtained protective orders against Movant in an effort to appease her father. (*Id.* at 71) Defense counsel urged the jury to conclude that the victim had lied and fabricated her story because she needed to make herself the victim "to keep her dad's good graces, to keep herself out of jail, to keep her baby out of CPS care or out of [Movant's] custody. . . . What mother wouldn't lie to keep her baby?" (*Id.* at 72)

The record amply demonstrates that defense counsel made the victim's and her sisters' motives to lie a primary element of the defense. Accordingly, Movant has failed to establish either prong of the *Strickland* test.

8. IAC regarding Movant's explanations for the victim's injurie

Movant contends in Ground 1 that his defense counsel were ineffective for failing to investigate and introduce evidence to support Movant's version of how the victim received her injuries on October 4, 2015. (Doc. 5 at 24-44) Movant asserts that defense counsel ignored his claims that: (1) the victim's injuries to her backside resulted from the victim's own intoxication when she stumbled and fell back into a car door while the group was at the 7-Eleven convenience store (Doc. 5 at 25-28); (2) Marcella attacked the victim in the car, causing the injuries to the victim's face and neck (*Id.* at 29-31); (3) Marcella had called Raula McCartney, the victim's ex-boyfriend, and asked him to come help her, telling

McCartney that Movant had beat up her and the victim (*Id.* at 32-34); (4) the victim's ankle injury resulted from her trek through the brush while wearing Movant's boots (*Id.* at 35-38); and (5) the victim suffered injury as a result of Movant's striking her with his hand in an attempt to keep her from overdosing from the combination of alcohol and painkillers (*Id.* at 44).

Contrary to Movant's claim, on direct examination, defense counsel had Movant detail his recollection of each of the circumstances identified above. (CR Doc. 123 at 38 (the victim falls into the car door); *Id.* at 61-66 (Marcella's attack of the victim); *Id.* at 66-69 (Marcella called Raula McCartney); *Id.* at 74, 79, 87 (the victim injured her ankle by stepping on a dirt clod); *Id.* at 84-86, CR Doc. 124 at 21-22, 146, 151-152, RT 9/14/2016 (Movant repeatedly struck the victim to keep her awake and prevent her from overdosing).

Defense counsel Anderson explained in her declaration that the defense had decided that the "most viable defense strategy was to: (1) question, or attempt to discredit, the credibility of the alleged victim, her ability to recall, and her motive to lie; and (2) question the source of her injuries." (Doc. 32-1 at 5, ¶ 10) The defense expected that Movant would testify as to the events of October 4 and 5, 2015, and about his position on why the victim would be motivated to fabricate her allegations against Movant. (*Id.* at 5-6, ¶ 10)

In closing argument, Ms. Anderson in fact argued that the physical evidence was "perfectly consistent" with Movant's testimony about how the victim received her injuries, and that while applying the presumption of Movant's innocence, the jury should resolve reasonable doubt about how the victim received her injuries in favor of Movant. (CR Doc. 134 at 42, RT 9/14/2016) Ms. Anderson specifically reminded the jury of Movant's description of Marcella's attack of the victim in the car and that Marcella had called Raula for help. (*Id.* at 46-47, 48) Anderson also emphasized Movant's explanation that he had no alternative to keeping the victim from overdosing other than shaking her to revive her, holding her up by her face, and hitting her on both sides of her head to get her to respond after she had apparently blacked out. (*Id.* at 53-55, 57) In her closing argument, Ms. Anderson further highlighted Movant's explanation that the victim was wearing Movant's

boots that were too large for her feet while walking through the brush in the dark when she twisted her ankle. (*Id.* at 57) Ms. Anderson asserted that there was no reason to believe this accident was Movant's fault. (*Id.* at 57-58)

Based on the above, it is clear that Movant's defense counsel did not ignore Movant claims regarding how the victim received her injuries, and instead made such claims a prominent focus of the defense. To the extent Movant argues that further investigation might have yielded additional exculpatory evidence, he fails to explain what evidence may have been uncovered or how the absence of such evidence prejudiced him. Accordingly, Movant fails to show that his defense counsel's representation was objectively unreasonable or that such representation prejudiced his defense.

9. IAC for failure to present additional witnesses

In Ground 7, Movant states that his defense counsel provided IAC by failing to call as witnesses the victim's sister Marcella, Denver Nash, Gunner Parish, Nikki Tallis and her daughter, Justin Spear, Raula McCartney, Tyler Chester, Rickie Todachinee, Beaver County Sheriff's Officer Tyson Barney, Norman Key, and Herman John. (Doc. 5 at 70, Doc. 40 at 40-42)

"An attorney 'must . . . provide factual support for [the] defense where such corroboration is available.'" *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) (quoting *United States v. Tucker*, 716 F.2d 576, 594 (9th Cir. 1983)). However, defense counsel need not follow every idea suggested by his client. *See Tucker*, 716 F.2d at 584 ("the duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed"). Courts will give deference to counsel's reasonable strategic decisions based on professional judgment. *Strickland*, 466 U.S. at 681.

Defense Counsel Anderson explained in her declaration that Movant's defense team interviewed the "percipient witnesses" in the case. (Doc. 32-1 at 6, ¶ 11) She stated that the defense expected the prosecution to call Marcella as a witness to testify she had seen Movant assault and kidnap the victim on October 4, 2015. (*Id.* at 10, ¶ 23) Anderson

declared the defense had "prepared a cross-examination designed to both impeach [Marcella] regarding the alleged assault and kidnapping and draw out helpful information" to include the victim's relationship with their father, their father's disapproval of the victim's relationship with Movant, and the victim's actions intended to conceal her continuing relationship with Movant from their father. (*Id.*) Ms. Anderson further detailed that when the prosecution decided not to call Marcella, the defense team considered whether to call her as a defense witness, but elected to not do so after concluding that "her testimony would do more harm than good[]" because Marcella was likely to present as "a third eyewitness to inculpate [Movant] in a violent assault and kidnapping" which could only bolster the prosecution case. (*Id.*) Ms. Anderson explained that Marcella's testimony might have been "acceptable damage if she also had crucial evidence to provide that furthered other aspects of our theory of the case and that we could not get in through other sources." (*Id.* at 10-11) The defense team concluded that evidence favorable to the defense had already come in during the testimony of the victim and of her sister Melinda, and that these witnesses had been impeached on some issues. (*Id.*) The defense determined it would be too risky to call Marcella because her testimony could bolster Marcella's and the victim's trial testimony. (*Id.*)

Undersigned concludes that Movant's defense counsel have established that the decision not to call Marcella was a reasonable strategic decision. Moreover, Movant fails to show that defense counsel's decision was performance that fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88.

Defense Counsel Anderson also explains that the defense team "spent considerable time and resources" unsuccessfully seeking to locate and interview Nikki Tallis and the driver of the truck who picked up Movant and the victim on the night of October 14, 2015, whom Movant calls "Rickie Todachinee." (Doc. 32-1 at 7, ¶ 16) Melinda testified that after Movant and the victim left the stranded car, she talked to Nikki Tallis, who was her friend, by telephone. (CR Doc. 180 at 41-42)

Navajo Nation Police Department Criminal Investigator Gillis testified he attempted to interview Nikki Tallis because he had been told by FBI Special Agent Sutherland that Tallis might have information regarding Movant's case. (CR Doc. 181 at 48) Gillis agreed with defense counsel that he had had reason to believe Ms. Tallis had seen Movant and the victim together on October 4, 2015. (*Id.* at 50) Gillis stated that he was able to make contact with Ms. Tallis once but that he lost the connection and repeated attempts to call her back were unsuccessful. (*Id.* at 50)

FBI Special Agent Sutherland declared that he and Investigator Gillis together attempted to call Ms. Tallis using a phone number Tallis provided to the police dispatcher on a call made on October 4, 2015, but the number was "not valid." (CR Doc. 132 at 12, RT 9/09/2016) On cross-examination, Agent Sutherland stated that he asked Melinda for a good phone number for Nikki Tallis but that he "did not get a response to that request." (*Id.* at 67)

Defense inspector Lee Carballo testified that he also tried to locate Nikki Tallis to interview her about Movant's case. (CR Doc. 182 at 62, RT 9/13/2015) Carballo said that he attempted to get Ms. Tallis' driver's license information, but that the information was not accurate. (*Id.*) He declared that he tried several telephone numbers, but the numbers were not "connected." (*Id.*) Carballo further stated that all addresses he obtained for Tallis were "not good addresses" for her. (*Id.*)

Criminal Inspector Gillis attempted to find the truck driver by speaking to "about three" workers at the Peabody Mine who would have been working on the same shift as the driver. (CR Doc. 181 at 47) Special Agent Sutherland testified that he also attempted to locate the truck driver, working with Gillis to search a residential area where it was thought the truck driver might live. (CR Doc. 132 at 13-14) Sutherland said that he and Gillis pursued talking to security guards at the Peabody Mine about employees and the vehicles they drove but were unable to identify the truck driver. (*Id.* at 14)

Similarly, Lee Carballo testified he attempted to locate and identify the truck driver by working with a senior human resources employee at the Peabody Mine. (CR Doc. 182

at 58-60) Mr. Carballo explained that he had fliers made that the Peabody Mine human resources department passed out in employee areas. (*Id.* at 60) That effort also failed to produce a potential witness. Carballo was told by the Peabody human resources employee that the company had recently experienced "a lot of layoffs and retirements" and that the truck driver "possibly could have been one of those individuals." (*Id.* at 60) Mr. Carballo declared he also unsuccessfully searched a residential area in Church Rock, Arizona, a few miles east of Kayenta, where it was suspected the driver might live. (*Id.* at 61)

The Supreme Court has instructed that "'counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary[.]'" *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Strickland*, 466 U.S. at 691 (emphasis added in *Pinholster*)). The Supreme Court has further recognized that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). Additionally, the Supreme Court has concluded that "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

With respect to the defense team's inability to locate either Ms. Tallis or the truck driver, the record reflects that the defense, and the prosecution for that matter, made reasonable but ultimately futile investigations to try and locate these witnesses. Accordingly, applying the "strong presumption" that defense counsel acted within the "wide range" of reasonable professional assistance, undersigned concludes that defense counsel's representation in this regard was not objectively unreasonable. *See Strickland*, 466 at 689. Further, Movant has not shown that the testimony of either of these witnesses would support a reasonable probability that with such testimony, the result of Movant's trial would have been different. *See id.* at 694.

Movant lists other potential witnesses that he alleges the defense team was ineffective for not calling as witnesses at trial. (Doc. 5 at 70) Movant indicates that: Denver Nash was an eyewitness "who spoke to [the victim] and stated she was not kidnapped or

abused"; Gunner Parish also "spoke to [the victim] and stated she was not kidnapped or abused"; Jane Doe (Tallis) "was with everybody until 5:15 p.m."; Justin Spear was "the driver of the truck that picked up Melinda . . . and [Movant's and the victim's baby]"; Raula McCartney was "the real third criminal/perpetrator/who attempted attacks on behalf of Marcella . . ."; Tyler Chester was an eyewitness who could testify that the victim "was okay and not attacked or kidnapped on October 4, 2015 and October 5, 2015"; Beaver County, Utah Sheriff's Office Deputy Tyson Barney would testify to a police report involving Movant and the victim; Norman Key, would say there was no kidnapping; and Herman John would testify that the victim led a "double life." (*Id.*) On cross-examination, Mr. Carballo indicated he had interviewed Tyler Chester and had tried to contact Justin Spear but was told Mr. Spear did not wish to speak to Carballo. (CR Doc. 182 at 70)

Movant provides the Court with no evidence or reason to believe, other than his self-serving statements, that any of the above-listed potential witnesses would have supplied helpful testimony. *See Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000). For example, Movant has not provided an affidavit from any of these potential witnesses stating what he or she would attest to. *Id.* Moreover, there is no evidence that any of these individuals would be willing to testify. *See United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (no ineffective assistance based upon counsel's failure to call a witness where, among other things, there was no evidence in the record that the witness would have testified). Petitioner has failed to demonstrate either deficient performance by defense counsel or prejudice regarding the defense's decision not to call these witnesses.

10. IAC for failure to obtain video surveillance tapes

Under Ground 1, Movant argues that his defense counsel were ineffective for failing to obtain video surveillance tapes from a 7-Eleven convenience store located in Kayenta, Arizona. (Doc. 5 at 27-28) Movant believes that tapes from video surveillance cameras would have captured the victim stumbling and falling with her back against the inside car door. (*Id.* at 26-27) Movant claims this incident actually caused the victim's "swelling, redness, bumps, and bruises all over her backside, on the back of the head, back neck, back

shoulders, back, lower back, butt, [and] back lower legs as a result of this accidental fall backwards." (*Id.* at 27)

In Ground 10, Movant again contends that his defense team was ineffective because they failed to obtain surveillance videotapes from the 7-Eleven convenience store in Kayenta. (*Id.* at 73-74) Movant asserts that his defense team instead mistakenly went to the Black Mesa store 20 to 30 miles west of Kayenta, which was not the location where Movant said the victim fell, and then did not follow up with the 7-Eleven store in Kayenta to obtain surveillance videotapes. (*Id.*, Doc. 40 at 44)

Defense counsel Anderson declares that she also believed that videotape captured at the Kayenta 7-Eleven store "might have been helpful" to Movant's case. (Doc. 32-1 at 8, ¶ 17) Ms. Anderson states that she instructed Mr. Carballo to "obtain any relevant surveillance video that might exist" for October 4, 2015, at the Kayenta 7-Eleven store. (*Id.*) Ms. Anderson states she also instructed Mr. Carballo to obtain any surveillance videotapes from both the Kayenta Shell gas station for the period later on the night of October 4, when Movant and the victim had briefly stopped there with the truck driver who gave them a ride, and the Black Mesa store where the victim asked for help on October 5, 2015. (*Id.*) Ms. Anderson declares that Mr. Carballo visited both the Kayenta 7-Eleven and Shell gas station and was told that surveillance videotapes were no longer available for October 4-5, 2015, and that the Black Mesa store did not have any working video cameras. (*Id.*)

Defense counsel attests that in fact Movant's defense team did attempt to obtain the surveillance videotape evidence that Movant asserts they did not try and secure. In his Reply, Movant supplies no reason to doubt counsel's statements. Accordingly, undersigned concludes that Movant has not established either deficient performance or prejudice and that defense counsel were not ineffective in this regard.

11. IAC for failure to obtain GPS data

Movant in Ground 5 argues that defense counsel provided IAC by their failure to reasonably investigate and obtain the GPS and other data pertinent to the victim's cell

phone, which was left in the brush during Movant's and the victim's trek between the car and the highway, and was never located. (Doc. 5 at 60-67) Movant asserts that in mid-2016, he insisted that defense counsel do whatever was necessary to obtain from the service provider all text messages, calls, voicemail, and GPS location data from the phone. (*Id.* at 61) Movant states that Ms. Anderson incorrectly advised him that the cell phone data did not exist because the phone was a pre-paid phone from Walmart, but that this was untrue. (*Id.* at 62) Movant claims that text messages from the victim's cell phone would have demonstrated that he and the victim had a loving relationship and that GPS data would have precisely confirmed Movant's story about the group's whereabouts on October 4, 2015. (*Id.* at 64-66) Despite Movant's arguments that records of text messages, voicemail and records of calls made would have assisted the defense, he explains that he learned after sentencing that "only the GPS location exist[ed]" for the victim's cell phone. (*Id.* at 63)

Movant also contends his defense counsel were ineffective for not obtaining cell phone data because if they had, a forensics expert would have been able to establish that Movant's explanation of the events of October 4, 2015, was the only accurate version. (*Id.* at 67)

In her declaration, Ms. Anderson indicated that she and defense investigator Carballo searched the scene in August 2016 for the victim's cell phone but they were not able to locate it. (Doc. 32-1 at 7, ¶ 14) Ms. Anderson opined that data from the cell phone might have proved helpful to Movant's case. (*Id.*, ¶ 15) Ms. Anderson also stated that the defense team had intended to retrieve the cell phone data but she did not recall, and her notes did not reveal "why we did not ultimately obtain the cell phone data or what I said to [Movant] about it." (*Id.*) Ms. Anderson averred, however, that she had no reason to doubt Movant's statement that she had told him the cell phone data could not be retrieved because it was a pre-paid phone purchased at Walmart. (*Id.*)

As noted, defense counsel had the duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Ms. Anderson states that she and investigator Carballo searched for the

victim's broken cell phone at the scene but were unable to find it. Based on Ms. Anderson's declaration, the defense initially intended to obtain cell phone data from the service provider but did not follow through for reasons Anderson did not record or recall. Movant believes that GPS location data from the victim's phone would have supported the timing of his version of the events of October 4, 2015, at least until Movant broke the phone and left it in the brush, part way between the car and the highway. (Doc. 5 at 64-66, CR Doc. 123 at 75-76)

Movant's argument lacks force, however, because he reports that only location information would have been available from the service provider regarding the victim's cell phone and the trial record establishes that the location of Movant and the victim at any relevant point in time was not a contested issue between the parties. Thus, even if Movant could establish that defense counsel failed in their duty to investigate for location data from the cell phone, he is not able to show that this failure prejudiced his case, that is, but for counsel's inaction, the result of his trial would have been different. *Strickland*, 466 U.S. at 694.

12. IAC regarding claim of false reports to law enforcement

In Ground 1, Movant asserts that his defense counsel provided IAC for failure to present evidence and argue that the Navajo Nation Police Department, FBI Special Agent Sutherland, and medical providers had accepted false reports from the victim and her two sisters Melinda and Marcella, which led to Movant's indictment and prosecution. (Doc. 5 at 20-21) Similarly, in Ground 11, Movant urges that his trial counsel were ineffective for failure to investigate and challenge the prosecution's witnesses' false versions of the events leading to his charges. (*Id.* at 75) In his Reply, Movant contends his trial counsel's failure to investigate deprived him of a fair trial that resulted in a "false verdict based on defective evidence." (Doc. 40 at 44)

Movant's arguments are unsupported. He does not present any evidence that Navajo Nation police officers involved in the case, or any of the victim's medical providers, or Special Agent Sutherland had reason to believe that the sisters were lying but then

documented and acted on their testimony despite such belief.

Further, the record is clear that Movant's theory of the case in fact was that he was innocent and the victim and her sister's testimony about the events was fabricated. Defense counsel Anderson attests in her declaration that the defense concluded the "most viable" defense strategy was to challenge the credibility of the alleged victim's testimony and that of her sisters and to question the true source of the victim's injuries. (Doc. 32-1 at 5, ¶ 10; 6, ¶ 12) Ms. Anderson advises the Court that she and co-counsel did not "challenge law enforcement's handling of the evidence because we did not feel that such a challenge would be fruitful." (*Id.* at 10, ¶ 22) Additionally, Ms. Anderson explained that the defense correctly anticipated that Movant would testify about the reasons he believed the victim and her sisters were motivated to fabricate the allegations against him. (*Id.*) The record amply demonstrates that defense counsel proceeded consistent with these strategies at trial.

Movant must also consider that charges were brought based on his own statements. When FBI Special Agent Sutherland interviewed Movant about injuries to the victim's face and "marks on her neck that were consistent with her being choked[,]" Movant admitted he had "put those there" after hitting the victim all over and holding her by her neck because he was afraid the victim might be overdosing and he had to determine if she was still "with me." (CR Doc. 132 at 54-57) Movant did not disavow such statements at trial. On direct questioning, Movant testified he had struck the victim's cheek with his left hand and also hit her with his right hand to try and bring her out of unconsciousness. (CR Doc. 123 at 84-85) Movant stated that because it was dark it was difficult for him to gauge how hard he was hitting the victim. (*Id.* at 85) Thus, Movant admitted to inflicting some of the victim's bruising, with the explanation that it was done solely to prevent the victim from overdosing on the mixture of alcohol and pain pills.

Movant has not established either that his trial counsel were ineffective for not investigating or challenging the prosecution's use of the victim's and her sister's reports of the events of October 4 and 5, 2015, or that his defense was prejudiced as a result. *Strickland*, 466 U.S. at 687.

13. IAC regarding fabrication of evidence

Under Ground 3, Movant asserts that FBI Special Agent Sutherland "distorted" what Movant had intended to convey in Sutherland's interview of him on October 20, 2015, regarding Movant's actions to keep the victim from succumbing to an overdose (Doc. 5 at 21), and also had coerced the victim's sister Melinda into falsely testifying in favor of the prosecution, when Movant claims she initially gave favorable testimony "that cleared [Movant] of any wrong doing." (*Id.* at 21-23). Movant argues defense counsel were ineffective when it did not challenge the testimony of either Sutherland or Melinda on these bases.

The record provides no support for Movant's claim that Special Agent Sutherland distorted Movant's statements made in Sutherland's interview of Movant on October 20, 2015. Sutherland testified at trial about the interview, which had been recorded and transcribed and was admitted as an exhibit at trial. (CR Doc. 132 at 24) In questioning by the prosecution about the injuries to the victim's face and Movant's avowed attempts to prevent the victim from overdosing, Agent Sutherland read aloud portions of the transcript. (*Id.* at 51-57) Defense counsel Anderson requested that additional portions of the transcript be read to provide adequate context to Movant's recorded statements to which the prosecution did not object. (*Id.* at 54) It is not apparent that Sutherland made any attempt to "distort" Movant's recorded answers to questions. Further, Movant does not provide any citations to the record describing the alleged distortion.

Similarly, Movant provides nothing beyond his own conclusory statements to support his claim that Agent Sutherland coerced Melinda into providing false testimony. This is insufficient to warrant habeas relief. *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994).

In Ground 17, Movant argues defense counsel were ineffective when they failed to object to the prosecution's discussion of the victim's pain contracts. (Doc. 5 at 82) Movant accuses the prosecution of altering evidence in medical records and "fabricating false evidence[.]" As is discussed below in Section IV(D), however, Movant offers only speculative, conclusory allegations that the prosecution deliberately presented false

evidence regarding the victim's use of painkillers. (Doc. 5 at 82) *See Borg*, 24 F.3d at 26 (stating that unsupported, conclusory allegations do not warrant habeas relief). Moreover, the Court ruled pretrial that extrinsic evidence of the victim's drug or alcohol use would not be admissible. (CR Doc. 178 at 12)

For the reasons discussed, Movant has not established defense counsel's representation with regard to Movant's Grounds 3 and 17 claims either fell below an objective standard of reasonableness or prejudiced his defense. *Strickland*, 466 U.S. at 687-88.

14. IAC regarding failure to cross-examine witnesses

Movant in Grounds 1 and 16 contends that his trial counsel provided IAC by failing to cross-examine witnesses on issues Movant asserts would support a defense based on the victim's motives to fabricate a story regarding her injuries and to avoid culpability, including the victim's prior substance abuse (Doc. 5 at 16, 18-19), photographs taken of the victim's injuries by an emergency shelter supervisor, and testimony about the victim's rape kit by Dr. Corinne Walker (*Id.* at 81).

a. Defense questioning about victim's substance abuse

The prosecution filed motions in limine requesting preclusion at trial of evidence of: (1) the victim's September 2013 conviction on misdemeanor crimes of intoxication and assault (CR Doc. 65); (2) use of drugs or alcohol by either the victim or other witnesses prior to October 4 and 5, 2015 (CR Doc. 66); and (3) witness testimony that six years earlier, the victim became aggressive and/or violent when she had been drinking (CR Doc. 86). The Court's September 6, 2016, minute entry indicates the Court granted these motions, but permitted Movant's testimony "as to what he believed the victim's drug or alcohol use was[]" and allowed "evidence of drug or alcohol use by witnesses on the day of the event[.]" (CR Doc. 90, CR Doc. 178 at 5-13, 30-32, RT 9/06/2016)

Trial transcripts indicate that, consistent with the Court's rulings on the motions in limine, the prosecution asked the victim if she drank alcohol on October 4, 2015. (CR Doc. 140 at 15, RT 9/07/2015) The prosecution also questioned the victim on how the Movant

generally reacted when the victim would drink and whether she drank alcohol on October 4. (*Id.* at 57-58) The prosecution further asked the victim about her use of pain pills and whether she had taken pain medication on October 4. (*Id.* at 58-59) On cross-examination, defense counsel verified that the victim had said she started drinking before the Movant arrived at her sister Melinda's house. (*Id.* at 83-84) In response to questioning by defense counsel, the victim agreed that she had continued to drink after the Movant joined her and her sisters, that she became intoxicated, and that she had taken her pain medication and consumed alcohol that day even though she was aware of warnings to not mix the use of the pain medication with alcohol consumption. (*Id.* at 85-88) The victim explained to defense counsel that a urine sample was obtained at the Tuba City Regional Health Center on October 5, 2015, and stated she knew she had opiates, alcohol, and THC from marijuana consumption a day or two prior in her system. (*Id.* at 104-106)

Defense counsel on cross-examination asked Melinda about whether the victim, Melinda, or their sister Marcella had been drinking on October 4, 2015. (CR Doc. 180 at 53-54, 56, RT 9/08/2016) The defense also asked Melinda if either she or Marcella were under the influence of any substance other than alcohol on October 4. (*Id.* at 60)

Dr. Corinne Walker conducted a sexual assault examination on the victim on October 5, 2015, at the Tuba City Regional Healthcare emergency room. (*Id.* at 62, 66) On cross-examination, defense counsel asked Dr. Walker to confirm that the victim did not tell Dr. Walker she had been drinking alcohol on October 4, or had used marijuana in the recent past, or had been regularly taking the narcotic Percocet. (*Id.* at 113)

Prosecution witness Dr. Jon Stucki examined the victim on October 5, 2015, at the Kayenta Indian Health Services emergency room. (CR Doc. 179 at 49, 52, RT 9/7/2016) Defense counsel asked Dr. Stucki to confirm that the victim denied alcohol use and reported no use of prescription medications. (*Id.* at 68-69) Navajo Nation Police Sergeant Byron Coolie searched for Movant and the victim on the night of October 4, 2015. (*Id.* at 8, 10-13) Defense counsel asked Sergeant Coolie whether when he spoke to Melinda he was able to determine whether or not she had been drinking alcohol. (*Id.* at 43) Navajo

Nation Police Inspector Lawrence Gillis investigated the victim's case beginning by reporting to the Kayenta Health Center on the afternoon of October 5, 2015. (CR Doc. 180 at 225-226, 229) On cross-examination, defense counsel asked Gillis to confirm that when he interviewed the victim at the Health Center, she did not mention drinking alcohol or taking pain pills on October 4. (CR Doc. 181 at 43, RT 9/09/2016) Defense witness Pearl Spear was asked by defense counsel whether when she interacted with the victim's sisters Marcella and Melinda on the night of October 4, 2015, she observed any signs that Marcella or Melinda had been drinking. (*Id.* at 139)

During defense counsel questioning, Movant stated that the victim was drinking St. Ides, a malt liquor, at her sister Melinda's on October 4, 2015. (CR Doc. 123 at 19, RT 9/16/2016) Movant further declared that problems during the course of his marriage to the victim had been caused by the victim's over-consumption of alcohol. (*Id.* at 21) Defense counsel asked Movant about who was drinking at Melinda's house and what they were drinking. (*Id.* at 23) Defense counsel also questioned Movant about the victim's [and/or her sisters'] alcohol consumption on October 4, 2015, at various points during his testimony. (*Id.* at 28, 30-32) Additionally, defense counsel asked Movant about the victim's use or abuse of pain pills both on October 4, 2015, and throughout their relationship, including asking Movant about instances when the victim was intoxicated and suddenly became physically aggressive toward Movant. (*Id.* at 38-41, 47, 76, 102, 128-129; Doc. 124 at 143, 148-150, RT 9/14/2016)

In her declaration, defense counsel Anderson explained that the best defense strategy would involve questioning or attempting to discredit the victim's credibility, her motive to lie, and her ability to remember events which would include evidence of the victim's alcohol and substance abuse. (Doc. 32-1 at 5-6, ¶ 10) In defense counsel Cain's declaration, he stated that his cross-examination of the victim was intended to impeach her testimony in part by "challenging her perception of events based upon her use of drugs and alcohol[.]" (*Id.* at 14-15, ¶ 10)

b. Defense questioning of the victim about her injuries

On cross-examination of the victim, defense counsel confirmed that the victim's testimony had been that Movant had hit her in the head with his closed fist numerous times during separate instances on the evening and night of October 4, 2015. (Doc. 140 at 77-78) Defense counsel asked the victim whether she had suffered any facial fractures, specifically including a broken nose, broken cheek bones, fractured eye sockets, or a broken jaw. (*Id.* at 78-79) The victim answered she had not. (*Id.* at 79) Movant's defense counsel inquired whether the victim had received any deep cuts to any part of her head, and the victim said she had not. (*Id.* at 79-80) After showing the victim a photograph taken shortly after the events of October 4, 2015, defense counsel asked her whether she agreed that the photograph did not indicate that either of her eyes were swollen shut, that she had any cuts to her lip, and that she did not suffer any loose or broken teeth. (*Id.* at 80-81) The victim agreed. (*Id.*)

c. Defense questioning on photographs taken at shelter

Movant asserts in Ground 16 that his defense counsel were ineffective for failing to "challenge the unprofessional, flawed, overexposed photographs taken of [the victim's] shoulder, neck and head by the misled emergency shelter supervisor." (Doc. 5 at 81, Doc. 40 at 46) Movant also claims counsel were ineffective for failing to retain an expert in photograph interpretation "to correct flaws in the photographs." (Doc. 5 at 81) On October 6, 2015, the victim was transported to a domestic violence/emergency shelter in Blanding, Utah. (CR Doc. 181 at 65, RT 9/09/2015) Kristine Paul was the executive director of the shelter when the victim resided there and testified for the prosecution. (*Id.* at 63) Ms. Paul said that she decided that the victim should be examined again by a doctor based on the extent of bruising all over the victim's body, and particularly around her neck. (*Id.* at 66) Ms. Paul took photographs with her cell phone of some of the victim's bruising, which was the shelter's policy. (*Id.* at 67) Ms. Paul gave testimony about what she concluded the photographs depicted, including bruising to the victim's eyes, the side of her face, her cheek, neck, knee, and leg. (*Id.* at 67-73) Because the quality of the photographs apparently

was poor, Ms. Paul was asked whether the bruising was more pronounced in the photographs than it appeared in person when she observed the victim. (*Id.* at 68, 69) Ms. Paul said that the victim's bruising and other injuries appeared more pronounced in person than in the photographs she had taken with her "really cheap cell phone." (*Id.* at 67, 68, 69)

When Ms. Paul was questioned about the first photograph presented to her, defense counsel objected on foundation grounds, arguing that the witness had not established she had "any special expertise in observation or recognition of injuries[.]" (*Id.* at 68) The Court overruled the objection. (*Id.*) On cross-examination, defense counsel obtained Ms. Paul's agreement that she had no first-hand knowledge of what caused the victim's injuries. (*Id.* at 75) Under these circumstances, defense counsel challenged Ms. Paul's ability to testify about the photographs but that challenge was rejected by the Court. Moreover, Movant provides no support for his claim that counsel were ineffective because they did not hire an expert to interpret the poor quality photographs.

d. Defense questioning about the victim's rape kit

Movant asserts his defense counsel was ineffective when they were unable to "disprove M.D. [Corrine] Walker['s] false medical [sexual assault] reports caused by pathological liar, [the victim]." (Doc. 5 at 81) Dr. Walker explained on direct examination that the victim was transported to the Tuba City Indian Health Services facility specifically for a sexual assault examination. (CR Doc. 180 at 69)

On cross-examination, defense counsel ascertained that Dr. Walker agreed that mixing alcohol and narcotics can cause loss of consciousness, that bones of the head can be broken when a person is hit and that Dr. Walker's examination of the victim did not indicate any bone fractures or lacerations of the head or evidence of a concussion or bleeding in the brain. (*Id.* at 116-122) Defense counsel elicited Dr. Walker's testimony that a person with a joint injury is more susceptible to reinjuring the joint, and that the injuries she observed on the victim's legs, chest, and face could have been caused by the victim tripping while hiking. (*Id.* at 125-126) Defense counsel further elicited Dr. Walker's testimony that she did not observe any injury to the victim's genitalia or her external anus

such as redness, abrasions or bleeding that could indicate sexual assault. (*Id.* at 127-132) Given these findings, defense counsel obtained Dr. Walker's opinion that it was possible an absence of such injuries could be "consistent with no assault occurring." (*Id.* at 133)

e. Conclusion

Applying the highly deferential standard for judging defense counsel's representation, Movant has not established either that his counsel's representation "amounted to incompetence under 'prevailing professional norms'" *Richter*, 562 U.S. at 105, or that there existed a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[,]"*Strickland*, 466 U.S. at 694. As detailed above, defense counsel effectively cross-examined numerous prosecution witnesses, including the victim, within the limits permitted by the Court in rulings on the parties' motions in limine, about the victim's and/or her sisters' alcohol or substance use. Similarly, defense counsel cross-examined the victim about the severity of her injuries received on October 4, 2015, soliciting answers potentially suggesting that the injuries were not caused by the Movant punching her with his closed fist, as the victim and her sister Melinda had testified. Defense counsel objected to Ms. Paul's testimony regarding photographs Paul had taken based on a lack of foundation for her conclusions about the victim's injuries, and solicited Ms. Paul's concession that she had no direct knowledge of what caused the victim's bruising. Further, defense counsel obtained testimony from Dr. Walker that the victim did not have any injuries to either her genitalia or her anus that would indicate a violent sexual assault.

All of this evidence refutes Movant's contention that defense counsel failed to adequately cross-examine witnesses at trial. Movant has not demonstrated defense counsel provided IAC under the *Strickland* test. Accordingly, undersigned recommends the Court find that Movant has failed to show IAC by his defense counsel regarding their cross-examination of witnesses.

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15. IAC for failure to convey plea offers

In Ground 15, Movant alleges his defense counsel provided IAC when they failed to present him with any one of three offered plea deals and did not allow him to pursue a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). (Doc. 5 at 80) In her declaration, defense counsel Anderson described the history of proposed plea agreement offers in Movant's case:

> One firm offer was made prior to trial, and a revised offer was suggested as a possibility if the defense were to provide some mitigation or evidence of a weakness in the government's case. These offers were extended in emails outlining only the major provisions of the offers (*e.g.* crime of conviction and sentence stipulations), with the expectation that a full written agreement would be drafted only if Mr. Sloan expressed interest, which he did not.

(Doc. 32-1 at 5, ¶ 9) Ms. Anderson declared that there was no written plea agreement she could have provided Movant but that she reviewed proposed offers with him orally in meetings. (*Id.*) Ms. Anderson explained the prosecution had initially offered a plea via e-mail dated February 4, 2016, to the crimes of kidnapping or aggravated assault with a sentencing range between 15 and 25 years. (*Id.*) She said she had overlooked that e-mail and was made aware of the offer on April 26, 2016, when the prosecution "suggested the possibility of improving on the initial offer" by permitting Movant to plead either to abusive sexual contact with a sentencing cap of 10 years or to assault resulting in serious bodily injury with a stipulated sentence of 10 years. (*Id.*) Ms. Anderson indicated that the improved offer would be subject to the defense providing "some mitigation or evidence of a weakness in the government's case." (*Id.*) Ms. Anderson stated she had reviewed the offers with Movant on April 27, 2016, and that he had "respectfully declined" them, which decision was consistent with his position previously that "he had no interest in any plea for any amount of time." (*Id.*) Anderson declared that Movant maintained this position in a settlement conference she later arranged with the prosecution where Movant was able to speak directly with the prosecutor. (*Id.*) Movant advised the Court in the final pretrial conference that he had received numerous plea offers that he understood fully and had

chosen to reject in favor of going to trial. (CR Doc. 174 at 22-23)

Defense co-counsel Cain declared that he attended the April 27, 2016, meeting with Ms. Anderson and Movant. (Doc. 32-1 at 14, ¶¶ 6-7) Mr. Cain stated that Ms. Anderson advised Movant the prosecution had extended an offer that "carried significantly less prison time than the previous plea offer." (*Id.* at ¶ 7) Mr. Cain asserted that Movant had "rejected the plea offers because he wanted the world to see the truth that the alleged victim lied about the allegations against him." (*Id.*)

Movant does not refute defense counsel's declarations' statements in his Reply. (Doc. 40)

On this record it is undisputed that defense counsel communicated several potential plea offers to Movant, and that Movant rejected each one. Accordingly, Movant has not demonstrated either that his defense counsel's representation was objectively unreasonable or that such representation prejudiced his defense.

16. IAC when counsel failed to present evidence of actual innocence

Movant contends his defense counsel provided IAC when they failed to investigate and present a defense arguing that the victim and her sisters fabricated the events and actions on which Movant was charged. (Doc. 5 at 16) Movant argues his defense counsel should have cross-examined the victim and her sisters about their motives for inventing the basis for Movant's charges. (*Id.*) Among the motives Movant describes were the desire to avoid law enforcement action against: (1) the victim for alleged assault against Movant, acts of child abuse against their baby, illegal acquisition and use of narcotic pain pills, public intoxication, and illegal marijuana use; (2) the victim's sister Marcella for her alleged assaults against Movant and the victim, kidnapping and child abuse of Movant's and the victim's baby, and driving while intoxicated or impaired resulting in a vehicle wreck; and (3) the victim's sister Melinda for alleged assault against Movant, kidnapping of Movant's and the victim's baby, illegal drug use, and public intoxication. (*Id.* at 16, 18)

Movant further argues the victim was motivated to fabricate a false narrative so that she did not need to explain that her intoxication and pain pill use caused her to pass out,

fall backward into the car door causing injury to her backside, stumble and injure her ankle, and that Movant cut his wrist because she needed his assistance to climb over a barbed wire fence, which bloodied the victim's clothing. (*Id.* at 18-19) Movant asserts that the victim's and her sisters' lies were adopted as true by law enforcement, medical providers, and tribal courts. (*Id.* at 20) Movant further states that because defense counsel did not properly pursue an actual innocence defense, the federal court jury was confused into believing Movant was responsible for the victim's injuries that were actually caused by her sister Marcella or resulted from the victim's impairment due to alcohol and pain pill abuse. (*Id.* at 24-25) Movant contends that blood on the victim's shirt and pants was not the victim's blood, but rather came from a cut on his wrist suffered when he helped the victim cross a barbed wire fence. (*Id.* at 42-43)

Movant concludes that the "real" version of events he has detailed proves he is actually innocent of the charges (*Id.* at 35-40) and declares his defense counsel "failed to prepare for trial in a defense of actual innocence" (*Id.* at 80). The record, however, does not back up Movant's claims.

On cross-examination of the victim, defense counsel Cain established that on October 4, 2015, the victim began drinking on her own before Movant arrived (CR Doc. 140 at 84); that she became intoxicated (*Id.* at 86); that the victim knew drinking alcohol and taking pain pills together could be dangerous and could cause her to lose consciousness but did it anyway (*Id.* at 87-88); that she was close enough to police officers and her friend searching for her to call for help on the night of October 4, 2015, but did not do so (*Id.* at 91-92); that she did not ask for help from the person who gave her and Movant a ride into Kayenta and then to Movant's trailer, even when she was alone in the truck with the person (*Id.* at 93-95); that she did not advise the emergency room doctor in Kayenta she had been taking pain medication while also drinking alcohol (*Id.* at 104); that she had spent time with Movant despite her father's direction to stay away from Movant and despite having obtained orders of protection against Movant (*Id.* at 107-114); that in September 2015 in Mesa, Arizona, Movant and the victim had argued, Movant had called the police, and the

victim had been arrested on an old misdemeanor warrant and jailed for about two weeks (*Id.* at 115-117); and that the victim had not shared portions of her trial testimony with Navajo Nation police investigators when they had interviewed her (*Id.* at 119-122).

On cross-examination of the victim's sister Melinda, defense counsel Anderson established that Melinda loved both of her sisters and was "very protective of them." (CR Doc. 180 at 50) On questioning by Ms. Anderson, Melinda stated that the victim did not drink alcohol on October 4, 2015, until the evening when the group went into Kayenta. (*Id.* at 53) This statement was contradicted by the victim's testimony. (CR Doc. 140 at 84) Melinda stated that just before the group stopped on the side of the road outside of Kayenta, the victim had hit Movant. (CR Doc. 180 at 54) Ms. Anderson questioned Melinda about inconsistencies between her trial testimony and her statements to FBI Agent Sutherland. (*Id.* at 55-56, 57) Despite Melinda's testimony on direct examination that Movant had handled his baby son roughly on October 4, on cross-examination she stated that she did not seek medical examination of the baby. (*Id.* at 59-60)

Through questioning by defense counsel Anderson, Movant testified in extensive detail about his version of the events of October 4 and 5, 2015, as well as his activities thereafter in Utah and Washington State until he returned to the police department in Kayenta and was arrested on October 19, 2015 (CR Doc. 180 at 220). (CR Doc. 123 at 12-149, CR Doc. 124 at 3-22, 139-161)

Based on witness testimony, Defense counsel's closing argument in fact focused on the victim's motivations for fabricating the allegations against Movant, including evidence that protective orders obtained by the victim against the Movant were based on lies and the victim obtained them solely for the benefit of her father, whose approval she had strong family and financial motives to maintain, and who wanted Movant out of the victim's life. (CR Doc. 134 at 38-41) Ms. Anderson noted that testimony by prosecution and defense witnesses about the timeline on October 4 and 5, 2015, was largely in agreement and that the physical evidence was susceptible to supporting either of the opposing explanations of what occurred. (*Id.* at 42, 43-45) In that circumstance, Ms. Anderson argued that the

allegations of the victim and her sisters should be viewed with skepticism and that reasonable doubt should favor Movant. (*Id.* at 42) Additionally, Ms. Anderson urged the jury to consider damning testimony the victim gave at trial that she had failed to provide to police officers or medical providers when her recollection was freshest. (*Id.* at 43) Ms. Anderson explained why Movant's testimony that Marcella attacked the victim in the car was consistent with his version of events and inconsistent with the sisters' versions. (*Id.* at 46-48) Based on the testimony of Navajo Police officers Coolie and Mann that they observed no drag marks leading away from the car, Ms. Anderson argued that this disproved Melinda's testimony that she saw Movant hit the victim and that the victim fell unconscious to the ground next to the car. (*Id.* at 50-51) Based on the victim's testimony that she was intoxicated and had also used pain pills, Ms. Anderson contended that Movant's testimony that the victim asked him to make love to her was not farfetched and corroborated the absence of genital injuries. (*Id.* at 52-53) Based on that same testimony by the victim that she had combined the intake of alcohol and pain pills, Ms. Anderson asserted that Movant's testimony that he had to do whatever it took to keep the victim awake by shaking her, grabbing her neck, hitting her on both sides of her face, and otherwise keeping her from overdosing made sense. (*Id.* at 53-55)

Ms. Anderson further argued that Movant's statement that the blood stains on the victim's clothing came from his wrist was consistent with his version of events rather than the victim's version, particularly because she did not have any injury that would result in any significant bleeding. (*Id.* at 59) Additionally, Ms. Anderson asked the jury to use their common sense to consider whether it was logical to believe the victim's version of events that Movant forced her to have anal sex on the ground, in the cold, without any lubrication but that she suffered no injury to her anus. (*Id.* at 62) Similarly, Ms. Anderson asserted that it was unlikely that the victim would fail to communicate her dire predicament to the person who drove them to Movant's trailer when she was briefly alone with that person, or try to flee the truck when they stopped at a gas station in Kayenta, if it were true that she had been kidnapped and assaulted by Movant. (*Id.* at 63-64) Ms. Anderson declared it was

equally unlikely that she would not attempt to escape the travel trailer on October 5, 2015, or call out to the Chester family if she were there against her will. (*Id.* at 65, 68) In the same vein, Ms. Anderson asked the jury to consider why, if Movant actually had kidnapped the victim, he would sleep without restraining her, and later leave the victim unattended and unrestrained several times during the day. (*Id.* at 65-66)

Defense counsel Anderson argued to the jury that the victim was motivated to lie and did lie about what really happened because if her father found out she had willingly been with Movant all day and night and the next day, he likely would have kicked her and her baby out of his house again. (*Id.* at 69) Ms. Anderson declared that the victim's sisters also wished to avoid their father's displeasure at their accompanying the victim and Movant. (*Id.* at 70) Ms. Anderson told the jury that the victim set her lies in motion and remained committed to a manufactured story in order to keep her baby. (*Id.* at 70)

After describing Movant's requests to be taken to the places he and the victim had traveled on October 4 and 5, and for the police to observe vehicles leaving the Peabody Mine with him so he could identify the truck driver who gave him and the victim a ride, Ms. Anderson advised the jury that Movant was "an innocent man, tortured with false allegations screaming for anybody who will listen. I am innocent. Help me prove it. Please." (*Id.* at 74-75) The record thus demonstrates that Movant's trial defense in fact was premised on the victim's and her sisters' credibility and their motivations to fabricate their versions of the events, on the victim's ability to recall events, on the genesis and extent of the victim's injuries, and on the consistency of Movant's version with evidence adduced at trial.

In her declaration attached to the Government's Response, Ms. Anderson asserts that Movant had "strong opinions about the theory of his case and he wanted to be heavily involved." (Doc. 32-1 at 9, ¶ 20) Ms. Anderson states she spent significant time with Movant discussing the case, including his version of the events, the witnesses, his relationship with the victim and her family, the evidence generally and his anticipated trial testimony. (*Id.*) Ms. Anderson details that she met with Movant 17 times either in person

at his detention facility or via video teleconferencing, including over a weekend during his trial. (*Id.* at 11, ¶ 25) She declares that Movant had provided her with written correspondence, drawings, and voicemails "describing what happened, where it happened, and what he wanted us to do." (*Id.*) Ms. Anderson explains that she and Movant agreed "on the themes of the case for trial[.]" Additionally, Ms. Anderson asserts that the investigator assisting defense counsel "interviewed the percipient witnesses" which assisted her to "impeach the government's witnesses in trial about the nature of the events on October 4-5, 2015 and to corroborate [Movant's] testimony." (*Id.* at 6, ¶ 11)

Ms. Anderson explains that she accompanied the defense investigator on his inspection of the scene of the offenses but noted that it was several months after the events of October 2015 that she was provided the exact location of the scene by the government case agent and by then there was no useful footprint evidence. (*Id.* at 6-7, ¶ 14) Further, Ms. Anderson declares that the defense determined that blood typing evidence or DNA analysis of stains on the victim's clothing would not be determinative in light of independent evidence of a lack of any injury on the victim's face and body that could have resulted in any significant bleeding. (*Id.* at 6, ¶ 13) Ms. Anderson explains that her team "spent considerable time and resources attempting to locate Nikki Tallis [a friend who spent time with the Movant, the victim, and the victim's sisters in Kayenta on October 4, 2015] and the unidentified individual who gave [Movant] and the alleged victim a ride on October 4-5, 2015[.]" (*Id.* at 7, ¶ 16) Ms. Anderson attested that although the defense team distributed flyers at the Peabody Mine, where Movant thought the individual worked, and drove around the community of Church Rock, where Movant believed the individual lived and searched for a truck fitting the Movant's description of the individual's truck, the individual was not located. (*Id.* at 7-8, ¶ 16)

The record establishes that defense counsel in fact were very effective in applying the record evidence to promote the defense theory of Movant's innocence. Movant has not demonstrated constitutionally ineffective assistance of counsel under the *Strickland* test.

B. Freestanding Claim of Actual Innocence

In Ground 19, Movant argues a freestanding claim of factual and actual innocence. (Doc. 5 at 84; Doc. 40 at 49) Respondent contends that Movant's actual innocence claim is procedurally defaulted for failure to raise the argument on direct appeal, and that in any case the claim fails on the merits.

The United States Supreme Court has assumed without expressly deciding that a "freestanding" claim of actual innocence is cognizable on federal habeas review. *See House v. Bell*, 547 U.S. 518, 554-55 (2006); *Herrera v. Collins*, 506 U.S. 390, 417 (1993). The Ninth Circuit has also assumed without deciding that a freestanding actual innocence claim in a non-capital context is cognizable in a federal habeas corpus action. *See e.g., Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014); *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997) (en banc). The Supreme Court has instructed that the standard for establishing entitlement to relief on a freestanding actual innocence claim would be "'extraordinarily high.'" *Carriger*, 132 F.3d at 476 (quoting *Herrera*, 506 U.S. at 417). The Ninth Circuit has concluded that to prevail on such a claim, a movant "must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.*; *see also Cooper v. Brown*, 510 F.3d 870, 923 (9th Cir. 2007) ("Under these standards, a petitioner must affirmatively prove that he is probably innocent"). This standard is even higher than that applied by courts considering a miscarriage of justice exception to procedural default, which "is not an independent avenue to relief[,]" but rather, "if established, . . . functions as a 'gateway,' permitting a habeas petitioner to have considered on the merits claims of constitutional error that would otherwise be procedurally barred." *Carriger*, 132 F.3d at 477 (citing *Schlup v. Delo*, 513 U.S. 298, 315-16 (1995), *Herrera*, 506 U.S. at 404). The standard articulated in *Schlup* to permit a court to consider a procedurally defaulted claim requires a petitioner to "show that in light of all the evidence, including new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Id.* at 478 (quoting *Schlup*, 513 U.S. at 327). The Supreme Court in *House v. Bell* concluded that its decisions in

Herrera and *Schlup* implied "at the least that *Herrera* requires more convincing proof of innocence than *Schlup.*" 547 U.S. at 555.

Undersigned finds that the Movant has not established, and the record does not support a finding, that Movant is probably innocent of the charges on which he was convicted. Additionally, Movant supplies no new evidence favoring a conclusion that, in light of all the evidence it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. It is recommended that the Court find that Movant's actual innocence claim lacks merit.

C. Exclusionary Rule Error by the Court

In Ground 13, Movant argues that the Court abused its discretion and erred by ruling that FBI Special Agent Richard Sutherland could be present at all times during Movant's trial. (Doc. 5 at 78, Doc. 40 at 45) Movant believes that Agent Sutherland's presence throughout his trial violated the exclusionary rule and concludes that after Sutherland heard other witnesses' testimony, he tailored his testimony to coincide with that given by previous witnesses and thereby deprived Movant of a fair trial. (Doc. 5 at 78) Respondent contends that Movant's claim is procedurally defaulted because he did not challenge Agent Sutherland's presence at trial, did not raise this issue on direct appeal, and that in any case the claim is without merit. (Doc. 32 at 49-50)

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted). In his Reply Movant does not dispute the Respondent's contention that this claim is procedurally defaulted and does not otherwise argue that procedural default of the claim should be excused. Movant, however, does generally contend that he is actually innocent of the charges underlying his convictions and also asserts a freestanding claim of factual and actual innocence in Ground 19. (Doc. 5 at 84) As is discussed above in Section IV(B), Movant fails to establish he is entitled to relief on a freestanding claim of actual innocence. Moreover, in light of the significant evidence

of Movant's guilt presented at trial, including Movant's statements to Agent Sutherland and witness testimony, and the absence of any new reliable evidence supporting Movant's actual innocence, undersigned concludes that Movant has not demonstrated that in light of new evidence it is more likely than not that any reasonable juror would have reasonable doubt about Movant's guilt. *House*, 547 U.S. at 538.

D. Claims of Prosecutorial Misconduct

Movant contends in Ground 14 that FBI Agent Sutherland and both prosecutors in his case were aware that the victim's sister Marcella was actually "the real criminal perpetrator" who was responsible for "the majority of injuries on the entire front side of" the victim, but failed to call Marcella at trial, thus engaging in mutual misconduct and depriving Movant of a fair trial. (Doc. 5 at 79, Doc. 40 at 45) Additionally under Ground 17, Movant claims the prosecutors manipulated the evidence to make it appear that the victim had current pain contracts with her medical providers when in truth she was abusing pain pills by "using someone else's prescribed pain pills[.]" (Doc. 5 at 82, Doc. 40 at 47)

Movant has procedurally defaulted these claims because he did not raise these issues on direct appeal. Nor does Movant attempt to excuse this default by establishing cause and prejudice, or otherwise indicate a reason why he did not assert the claims on appeal.

Furthermore, Movant offers only speculative, conclusory allegations that Agent Sutherland and the prosecutors knew that Marcella, not Movant, had attacked the victim, or that the prosecution deliberately presented false evidence regarding the victim's use of painkillers. (Doc. 5 at 79, 82) *See Borg*, 24 F.3d at 26. In fact, when discussing pretrial motions on the first day of trial on September 6, 2016, the Court addressed the Government's motion in limine (CR Doc. 66) seeking to preclude the defense from introducing evidence of the victim's drug use prior to the dates of the charged crimes. (CR Doc. 178 at 5-13) Defense counsel Anderson explained to the Court that the victim had been on a pain contract regarding her opiate painkillers and "had a history that she was on pain pill contracts[.]" (*Id.* at 8) The Court ruled that extrinsic evidence of the victim's drug or alcohol use would not be allowed, but that Movant would be permitted to testify as to

his understanding of what the victim's drug use was, "and even if it was drug abuse, if that's what he thought it was." (*Id.* at 12)

Movant has not established actual innocence sufficient to permit a court to consider this procedurally defaulted claim. Movant fails to show that in view of all the evidence, including new evidence, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. Additionally, Movant's speculative claims of prosecutorial misconduct lack any record evidence support.

V. EVIDENTIARY HEARING

In his Motion, Movant requests that the Court "[h]old an evidentiary hearing as this Court deem[s] necessary or appropriate[.]" (Doc. 5 at 86) The Court, however, need not hold an evidentiary hearing if the record conclusively shows that Movant is either not entitled to relief or if, in light of the record, his claims are "palpably incredible or patently frivolous." *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (citing *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)). In other words, an evidentiary hearing is required if the petition, files, and record of the case do not conclusively show that the petitioner is entitled to no relief. For the reasons set forth above in Section IV, Movant has failed to establish he is entitled to an evidentiary hearing on any of the Grounds in the Motion. Accordingly, the Court should determine that an evidentiary hearing is unnecessary. *See* 28 U.S.C. § 2255(b) (no evidentiary hearing required where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

VI. MOTION FOR BAIL HEARING

Movant recently filed a motion for a bail hearing pending resolution of his Motion. (Doc. 47) He claims that the Motion has a high probability of success on the merits based on his claim that the Court lacks subject matter jurisdiction because Movant and the defense team stipulated that Movant was an Indian pursuant to 18 U.S.C. § 1153(a). (*Id.* at 2-13, citing 28 U.S.C. § 2255(a))

As is discussed above in Section IV(A)(1)(b), Ms. Anderson explained that Movant was consulted about the decision to stipulate to his status as an Indian pursuant to the IMCA, that he was advised of risks to the defense case if he did not so stipulate, and that Movant agreed with the decision. (Doc. 32-1 at 8, ¶ 18) In the Court's final pretrial conference held on August 4, 2016, the parties advised the Court that they had stipulated to Movant's Indian status and suggested that the stipulation might require an additional jury instruction. (CR Doc. 174 at 21, RT 8/4/2016) In the final instructions to the jury, the Court instructed with regard to the "determination of Indian status for offenses committed within Indian Country" that the Government had the burden of proving: (1) that Movant had some quantum of Indian blood; and (2) that Movant was "a member of or affiliated with a federally-recognized tribe at the time of the offense." (CR Doc. 183 at 12-13, RT 9/14/2016) The Court instructed the jury that "[i]n this case, the parties have stipulated the [Movant] is an Indian and you should therefore treat this fact as having been proved." (*Id.* at 13)

Federal courts have upheld parties' stipulations to a defendant's Indian status with regard to 18 U.S.C. § 1153(a). *United States v. Buckles*, 804 Fed.Appx. 785, 787 (9th Cir. 2020); *United States v. Martin*, 777 F.3d 984, 993-94 (8th Cir. 2015). Additionally, the Ninth Circuit has recognized that Federal Rule of Civil Procedure "governs the issue of the release or detention of a prisoner, state or federal, who is collaterally attacking his or her criminal conviction." *United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994). "In the habeas context, [the Ninth Circuit] has reserved bail for 'extraordinary cases involving special circumstances or a high probability of success.'" *Id.* (quoting *Land v. Deeds*, 878 F.2d 318, 318 (9th Cir. 1989)). Respondent notes that in the Ninth Circuit it is unclear whether a district court is authorized to grant bail while a § 2254 habeas petition is pending. (Doc. 48 at 4)

Here, the Court need not reach the question of whether it is authorized to grant bail in this matter because Movant plainly has not established either the existence of special circumstances or a high likelihood of success. Special circumstances warranting release

pending habeas resolution may "include 'a serious deterioration of health while incarcerated, and unusual delay in the appeal process.'" *Mett*, 41 F.3d at 1281, n.4 (*quoting Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989)). An additional special circumstance exists "where 'the sentence was so short that if bail were denied and the habeas petition were eventually granted, the defendant would already have served the sentence.'" *Cohn v. Arizona*, 2015 WL 4607680, at *2 (D. Ariz. July 31, 2015) (*quoting Landano v. Rafferty*, 970 F.2d 1230, 1239 (3rd Cir. 1992)).

Movant has not established he has suffered a serious deterioration of his health while incarcerated or that there has been any unusual delay in the habeas process. Further, as addressed herein, undersigned concludes and recommends that Movant's § 2255 Motion should be denied. Accordingly, undersigned recommends that the motion for bail be denied.

VII. CERTIFICATE OF APPEALABILITY

A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A § 2255 movant must show that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). A certificate of appealability should be granted for any issue that the petitioner can demonstrate is debatable among jurists of reason, could be resolved differently by a different court, or is adequate to deserve encouragement to proceed further. *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002). The court must resolve doubts about the propriety of a certificate of appealability in the petitioner's favor. *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000).

For the reasons set forth in Section IV above, undersigned concludes that Movant has failed to make a substantial showing of the denial of a constitutional right.

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VIII. CONCLUSION

Based on the above analysis, undersigned recommends the Court should deny the Motion (Doc. 5). As discussed above, the grounds in the Motion are without merit and do not warrant an evidentiary hearing. The Motion should be denied without an evidentiary hearing. Additionally, Movant's motion for a bail hearing should be denied for the reasons set forth above. Further, Movant has not made a substantial showing of the denial of a constitutional right in any ground of his Motion; thus, a certificate of appealability should be denied. *See* 28 U.S.C. § 2253(c)(2).

Accordingly,

IT IS RECOMMENDED that Eli Sloan's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Doc. 5) be denied without an evidentiary hearing.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because Movant has not made a substantial showing of the denial of a constitutional right.

IT IS FURTHER RECOMMENDED that Movant's Motion for Bail Hearing in Order to Grant Bail Pending a § 2255 Decision by the District Court (Doc. 47) be denied.

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

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 13th day of July, 2021.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Eli Sloan,

Petitioner,

v.

United States of America,

Respondent.

No. CV-20-08133-PCT-DLR (DMF)
No. CR-15-08232-PCT-DLR

ORDER

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Deborah M. Fine (Doc. 51)[1] regarding Petitioner Eli Sloan's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 5), his supplement to the motion (Doc. 31), a Motion for Bail Hearing in Order to Grant Bail Pending a § 2255 Decision by the District Court (Doc. 47), and Motion to Clarify Counts 3 & 4 (and 6) are not Within Indian Country Within the Meaning of 18 U.S.C. § 1151(c) (Doc. 67). The R&R recommends that the Motion to Vacate, Set Aside or Correct Sentence be denied without an evidentiary hearing and that the motion for a bail hearing also be denied.

The Magistrate Judge advised the parties that they had fourteen days from the date of service of a copy of the R&R to file specific written objections with the Court. Petitioner

[1] Citations to the record indicate documents as displayed in the official electronic document filing system maintained by the District of Arizona under Case Numbers CV-20-08133-PCT-DLR (DMF) and CR-15-08232-PCT-DLR. Citations to documents within Petitioner's criminal case are denoted "CR Doc." Citations to documents in this 28 U.S.C. § 2255 matter are denoted "Doc."

filed his objections to the R&R on September 7, 2021 (Doc. 59), Respondent filed its response to Petitioner's objections on June 10, 2021 (Doc. 60), Petitioner filed a Motion for Reply to Government's Response to Defendant's Objections to Magistrate's Report and Recommendation on October 1, 2021 (Doc. 62) and another Motion for Reply to Government's Response to Defendant's Objections to Magistrate's Report and Recommendation on November 1, 2021 (Doc. 66).

The Court has considered the objections and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Many of Petitioner's objections are unsupported by facts and largely disagree with findings of the jury, or just repeat arguments previously made in his underlying motions. As explained below, Petitioner has not raised an objection that warrants rejection of the R&R.

I. Background

On September 15, 2016, after a trial to a jury, Petitioner was found guilty of Kidnapping in violation of 18 U.S.C. §§ 1153 and 1201 (Count 1); Assault with Intent to Commit Aggravated Sexual Abuse or with Intent to Commit Murder in violation of 18 U.S.C. §§ 1153 and 113(a)(1) (Count 2); Aggravated Sexual Abuse (vaginal) in violation of 18 U.S.C. §§ 1153 and 2241(a)(1) (Count 3); Aggravated Sexual Abuse (anal) in violation of 18 U.S.C. §§ 1153 and 2241(a)(1) (Count 4); Assault of a Spouse or Intimate Partner Resulting in Substantial Bodily Injury in violation of 18 U.S.C. §§ 1153 and 113(a)(7) (Count 5); and Assault of a Spouse or Intimate Partner by Strangling or Suffocating in violation of 18 U.S.C. §§ 1153 and 113(a)(8) (Count 6). (CR Docs. 90-96, 105.) The R&R accurately summarizes the facts, the evidence, the arguments of the parties at trial, and the findings by the Ninth Circuit on Petitioner's direct appeal. (Doc. 51 at 2-5.)

II. Standard of Review

Pursuant to Federal Rule of Civil Procedure 72(b)(2), a party objecting to a Magistrate Judge's R&R must state "specific written objections to the proposed findings and recommendations." The Court must then "determine de novo any part of the magistrate

judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(c). General objections are insufficient. "The Court is relieved of any obligation to review a general objection to the R&R." *McDowell v. Richardson*, No. CV-11-0716-PHX-DGC, 2012 WL 393462, at *2 (D. Ariz. Feb. 7, 2012); *see also Martinez v. Shinn*, No. CV-19-04481-PHX-DGC-ESW, 2020 WL 6562342, at *2 (D. Ariz. Nov. 9, 2020) ("Because de novo review of the entire R&R would defeat the efficiencies intended by Congress, a general objection has the same effect as would a failure to object.") (internal citation and quotations omitted).

III. Standard for Ineffective Assistance of Counsel Claims

Petitioner alleges claims of ineffective assistance of counsel in Grounds 1 through 12 and 15 through 18 of his § 2255 motion. (Doc. 5 at 5-77, 80-83.) The R&R correctly explained the standard.

> To qualify for relief pursuant to a claim of ineffective assistance of counsel ("IAC"), a movant must show both that counsel's representation fell below an objective standard of reasonableness and also that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). In reviewing counsel's performance, courts "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The standard for judging counsel's representation is "highly deferential." *Id.* It is "all too tempting" to "second guess counsel's assistance after conviction or adverse sentence." *Id.* "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).
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> To establish prejudice, a movant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* The court need not reach both components of *Strickland*. 466 U.S. at 697 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

(Doc. 51 at 6.)

IV. Objection 1

In his first objection, Petitioner argues that the R&R erred by accepting the factual findings of the jury. Petitioner asserts that the R&R failed to "resolve the insufficient proof of a direct vital link or nexus of the [fabricated] accusation to the physical aspects of the scene[.]" (Doc. 59 at 2.) He argues that there is not enough information to conclude that he was not falsely convicted because the R&R did not consider the footprints, false claims, and blood. He argues that his counsel was ineffective for not investigating this physical evidence.

Petitioner's weight-of-the-evidence argument relies on conjecture and speculation. Petitioner bears the burden of proof on these claims. The weight of the evidence, like credibility of witnesses, is a decision for the jury. The evidence was sufficient to support the jury's verdict. Petitioner has not presented evidence that overcomes the overwhelming evidence of his guilt at trial. Petitioner's attempt to shift his burden of proof to the R&R to "resolve the insufficient proof" does not create an issue of fact and does not warrant an evidentiary hearing. Petitioner's bare assertions that the witnesses made false accusations, and his arguments and alternative theories about how the facts do not fit the physical evidence, are insufficient to overcome the jury's findings.

Petitioner further argues that the R&R should have recognized his attorneys failed to meet an objective standard of reasonableness because they did not explore photographs, footprints, blood drops on the ground at the scene, or blood stains inside the car. He claims that the R&R did not point to any photographs of the footprints at the scene that showed an altercation between the victim and him, and that "the R&R cannot provide this court with this vital link or nexus[.]" (Doc. 59 at 2.) Because of the lack of footprint evidence, he claims both that the R&R erred by accepting the jury's determination of the facts and that his attorneys were ineffective for not investigating and obtaining the exculpatory physical evidence.

The R&R correctly found that Petitioner has failed to show any of this evidence was

available to be examined by his lawyers or, more importantly, relevant. (Doc. 51 at 26.) The R&R correctly noted that nothing offered by Petitioner suggests any reasonable attorney would have explored that evidence. Petitioner has offered no expert opinion that his lawyers fell below the objective standard of reasonableness and has not shown what the photographs or other evidence would have been. He has not shown that any of the investigation he claims his attorneys should have performed would have resulted in the discovery of evidence helpful to his case. He has not shown a reasonable probability that any undiscovered evidence would have changed the outcome of the trial.

Petitioner also argues that the R&R erred by recommending no evidentiary hearing be allowed. A court must grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]" 28 U.S.C. § 2255(b). Here, the factual disputes Petitioner claims warrant an evidentiary hearing are unsupported accusations that his attorney and his investigator acted in "bad faith" with "fraudulent intent" in order "to suppress the truth." "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Petitioner's counsel, Ms. Anderson, determined that the passing of time, the winter weather, the absence of a precise location, and the passage of many other people through the crime scene following the assault would make the evidentiary value of footprints at the crime scene doubtful, and the R&R correctly found that determination was a reasonable strategic choice. (Doc. 51 at 26.) Although Petitioner argues that his version of the events on October 4, 2015, could have been established through documentation of footprint evidence (Doc. 5 at 46), his reliance on this possibility is misplaced. Officer Mann testified that within an hour and a half of the events surrounding Marcella's car, the only recognizable footprints around the car were those of the people present when Mann arrived at the scene. (CR Doc. 180 at 156.) Further, Officer Mann testified, consistent with Petitioner's own statements, that it rained at the crime scenes during the night of October 4, 2015. (*Id.* at 173.)

Other than his speculation about what the physical evidence might have shown, Petitioner has not shown that the physical evidence and footprints would or could have had any exculpatory value. He has not met his burden of showing that his attorneys provided ineffective assistance. He has not shown that the outcome of the trial probably would have been different had his lawyers investigated the matters raised in his motion. The R&R correctly found that no evidentiary hearing is warranted. Objection 1 is overruled.

V. Objection 2

Petitioner's second objection challenges the R&R's use of the term "Indian reservation" instead of "Indian Country." Petitioner objects to the R&R's finding that jurisdiction existed over him pursuant to the Indian Major Crimes Act ("IMCA") for the events that occurred on or near the state highway that ran through the reservation. The R&R correctly found that the jurisdiction of this Court was established at trial. Petitioner has not offered evidence to challenge that finding. There is no genuine dispute that the crimes for which Petitioner was convicted occurred within the confines of the Navajo Reservation. In fact, 18 U.S.C. § 1151 defines "Indian Country" to include "rights-of-way running through the reservation." The R&R correctly explained:

> [Petitioner's] argument is incorrect. In *United States v. High Elk*, the Eighth Circuit rejected an Indian appellant's argument that the federal courts lacked jurisdiction over a crime charged under the IMCA, committed by the appellant against another Indian on a section of South Dakota Highway 63 running through the Cheyenne River Indian Reservation. 902 F.2d 660, 661 (8th Cir. 1990). The appellant argued that the state had assumed exclusive jurisdiction over highways on Indian land under Public Law ("P.L.") 280 which allowed states to assume jurisdiction over Indian land within their boundaries[.]" *Id.* The Eighth Circuit concluded there was no authority holding that federal courts lacked jurisdiction under the IMCA in states like South Dakota that had assumed jurisdiction under P.L. 280. *Id.* That conclusion holds with even greater force here because Arizona has not adopted P.L. 280. *State v. Zaman*, 194 Ariz. 442, 445, 984 P.2d 528, 531 (1999) (Feldman, J., dissenting); *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993).

(Doc. 51 at 13.) Objection 2 is overruled.

VI. Objection 3

Petitioner's third objection complains that defense counsel used "material perjuries of Melinda" during opening statements to the jury, including the testimony of Melinda that she kicked Petitioner in the groin. (Doc. 59 at 5.) This objection lacks factual support (the fact that Petitioner disagrees with the testimony does not establish that it is incorrect, untruthful, or amounts to perjury), and Petitioner fails to indicate how the attorney would have known of the perjury or how removing that statement from the opening statement would probably have resulted in a different outcome at trial. The R&R's determination on this claim is correct. Objection 3 is overruled.

VII. Objection 4

In his fourth objection, Petitioner complains that the R&R improperly found that Grounds 13, 14, and 19 of his § 2255 motion are procedurally barred. Petitioner does not explain why the R&R's findings are incorrect, other than to say it used a "failed direct appeal." His reliance on *Massaro v. U.S.*, 538 U.S. 500 (2003) for the proposition that a claim of prosecutorial misconduct not raised on direct appeal is not procedurally barred is misplaced. *Massaro* involved a claim of ineffective assistance of counsel, whereas Petitioner's fourth objection concerns a claim of prosecutorial misconduct. The Court in *Massaro* held that a claim of ineffective assistance of counsel may be brought in a collateral proceeding under § 2255, regardless of whether it could have been raised on direct appeal. The Court explained that requiring a criminal defendant to bring an ineffective assistance of counsel claim on direct appeal was a waste of resources because an ineffective assistance of counsel claim often involves the development of a factual predicate, a process better suited for the trial court than the appellate courts. *Id.* at 505-507. The same concerns do not exist with a claim of prosecutorial misconduct. The R&R's determination is correct. Objection 4 is overruled.

VIII. Objection 5

Petitioner's fifth objection argues that the R&R "misapplies the 'offense' or multiple punishments for 'one offense.'" (Doc. 59 at 5-6.) He argues that the charges violate the Double Jeopardy Clause because the bruises on the victim were, according to

Petitioner, caused by her sister, Marcella. He argues that he should get an evidentiary hearing to "exclude Marcella criminal elements test." (*Id.* at 5.) He argues that the R&R was factually wrong when it found that the bruises on the victim were from Petitioner kicking her with steel toe shoes, knocking her down, and dragging her away on her back.

Petitioner's disagreement with the finding of guilt by the jury and the R&R's recitation of the facts supporting those findings does not create an issue of fact. The jury heard the evidence and Petitioner presents nothing, other than bare allegations and argument, that disputes those facts. Petitioner testified to those same facts and allegations at trial and the jury did not believe him. This action is not a second trial, where Petitioner presents the same facts he presented to the jury and the Court second-guesses the jury to reach its own factual conclusions. The jury is the finder of fact and it determined that Petitioner, not Marcella, drug the victim involuntarily into the wilderness and assaulted her repeatedly. There is no factual or legal basis for the arguments contained in this objection to the R&R.

The R&R correctly determined that Petitioner's argument that he was improperly charged for crimes he contends were committed by the victim's sister is not a claim under the Double Jeopardy Clause. Objection 5 is overruled.

IX. Objection 6

In his sixth objection, Petitioner argues that the Court should decline to follow *United States v. Zepeda,* 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc), because "it is unworkable and/or badly resolved." (Doc. 59 at 7.) *Zepeda* clarified what must be proven to establish jurisdiction under the IMCA.

The R&R correctly followed Ninth Circuit precedent by analyzing Petitioner's jurisdictional/ineffective assistance of counsel argument pursuant to *Zepeda.* The R&R correctly found that Petitioner had knowingly and voluntarily stipulated to the *Zepeda* elements at trial, that the stipulation was a reasonable trial strategy, and that he has not shown that any of the elements that he stipulated existed did not in fact exist. The Court declines Petitioner's request to ignore *Zepeda.* The R&R correctly determined that

Petitioner's claim of ineffective assistance counsel based on the failure to raise a jurisdictional motion is baseless. Objection 6 is overruled.

X. Objection 6A

Petitioner's next objection at page 13 of his objections (Doc. 59 at 13) is also labeled as his sixth objection. For purposes of this order, the Court will refer to this objection as Objection 6A. Objection 6A re-urges the argument that Petitioner's trial counsel was ineffective for failing to challenge the constitutionality of the Indian Civil Rights Act ("ICRA"). He argues that his convictions for misdemeanors in tribal court, used against him in trial and sentencing, were unconstitutional because he did not have a right to counsel during the tribal court criminal proceedings. He argues that his counsel should have filed a motion to challenge the tribal court convictions by moving to find the ICRA unconstitutional.

The R&R correctly found that Petitioner was not entitled to relief for three separate reasons. First, he did not identify any specific tribal court convictions. Second, the Supreme Court in *United States v. Bryant*, 579 U.S. 140, 154-57 (2016) rejected the argument that a defendant's uncounseled tribal-court convictions should not be used as predicate offenses in federal prosecution. Third, his § 2255 motion was not the proper vehicle for raising a constitutional claim. Objection 6A is overruled.

XI. Unnumbered Objection at Page 15

In his next objection, an unnumbered objection at page 15 of Doc. 59, Petitioner claims that the R&R misapplied the *Strickland* standard to the "fruit of poisonous tree test." Based on nothing more than speculation, Petitioner claims that his attorneys were ineffective for not filing a motion to suppress evidence that allowed him to be framed. He argues that a motion to suppress evidence seized through the consent of a third party, Chester, who owned and controlled the premises searched, would have been successful because Chester would not have consented to the search if he was told the search was being conducted to find evidence to incriminate Petitioner.

The R&R correctly found the search lawful. Chester owned and controlled the

property searched and had the authority to consent to the warrantless search. *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). Petitioner offers nothing more than his speculation that Chester would not have consented to the search. There is no evidence that trial counsel fell below the applicable standard by failing to file a motion to suppress or that such a motion could have been, let alone probably would have been, successful. This objection to the R&R is baseless. The unnumbered objection at page 15 is overruled.

XII. Objection 8

In Objection 8, Petitioner claims that the R&R made incorrect factual determinations and misapplied *Batson v. Kentucky*, 476 U.S. 79 (1986). He claims the R&R should have found that his trial counsel was ineffective for not raising a challenge to the release of a juror pursuant *Batson* and *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) during jury selection. He argues that his trial counsel should have raised a *Batson* challenge to the release of a juror excused for cause because of a hearing aid that was emitting a noise that could not be fixed and was distracting to the other jurors.

This is not a case where the prosecution used a peremptory challenge to remove a juror of color from the jury with no valid articulable reason, the scenario the Supreme Court addressed in *Batson*. At trial, this Court found during jury selection that the juror's hearing aids were making distracting noises that could not be fixed. There was a reason for the release of the juror unrelated to race. *Batson* is inapplicable. There was no basis for Petitioner's counsel to raise a *Batson* challenge to the release of the juror. The R&R correctly determined that there is no evidence that Petitioner's attorney failed to meet the objective standard of reasonableness. This objection to the R&R is baseless. Objection 8 is overruled.

XIII. Objection 9

Petitioner's ninth objection involves his claim that his trial attorneys failed to investigate and uncover exonerating evidence at the crime scene. He alleges that the R&R erred when it rejected his claim that his counsel was ineffective for not visiting the crime scene at Route 6486 and gathering footprint evidence. He claims the physical evidence at

the crime scene would have disproved, among other allegations, that he beat the victim in the car. He claims footprints at the scene would have exonerated him. This argument, like many others, is not supported by facts and boils down to Petitioner's disagreement with the jury's verdict and his speculation about what other potential evidence might have been found. The jury believed the victim and disbelieved Petitioner. None of the physical evidence that Petitioner claims should have been discovered or examined would have probably changed the outcome of the trial.

The facts of the case do not lend themselves to impeachment by physical evidence that may have existed at the crime scene for a short window of time. Petitioner admitted most of the allegations against him. His testimony at trial was that his acts were innocent, and the victim and her sisters presented the facts in a false light, framing him. For example, the victim testified Petitioner broke the car window where she was located with his hand and drug her out by her throat and hair. (CR Doc. 131 at 19-21, 24-25.) Petitioner admitted that he broke the window with his hand but testified that the window inexplicably "folded down" when he pressed it with his fingers. (CR Doc. 123 at 62-63.) He testified that he "helped" the victim from the vehicle. He denied that he drug her from the car by her hair, but rather removed her with a loving touch, "as a loving husband would to calm my wife down, like a blessing, like a missionary would give a blessing to somebody in need[.]" (*Id.* at 66-69.)

Other examples of the contrast between the trial evidence and Petitioner's explanation for his actions include the testimony of the victim and her sister, Melinda Mae Cowboy. They both testified that, after forcibly pulling the victim from the car, Petitioner physically forced the victim against her will into the desert wilderness on a cold night while she was barefooted. (CR Doc. 131 at 19-21, 24-25; CR Doc. 140 at 38; CR Doc. 180 at 38-39.) Petitioner testified that the victim willingly accompanied him into the "bush" for her own good, first because there was a dangerous person named Raula coming to their location, and second because Child Protective Services would remove her child if police found her intoxicated. (CR Doc. 123 at 68-72.)

Petitioner testified that the people who witnessed him taking his wife misunderstood the way he was pushing her into the bush. "They said I was pushing my wife and the way that they painted the picture is that I was pushing my wife in some violent manner, which is my—like the term was used out of context because in work I'm a foreman, I'm a firefighter, and why you push crew, push crew or hurry somebody along it doesn't mean that you're pushing them to the ground in a negative aspect. We were trying to leave as far as we can for good reason." (*Id.* at 73.)

Petitioner denied that the victim was barefoot. He testified that she was wearing sandals when they started and became barefoot only after they slipped off. When that occurred, Petitioner testified that that he gave her his boots. (*Id.* at 78-79.) The victim testified that as he was forcing her to walk in the desert, he knocked her to the ground, choked her, punched her in the head and severely injured her ankle when he tried to break it by jumping on it. (CR Doc. 131 at 26.) Petitioner denied jumping on her leg but agreed that the victim suffered an ankle injury so severe that he thought it was broken. (CR Doc. 124 at 76.)

Witnesses testified about calling the police and efforts to locate the victim after she was taken into the bush by Petitioner. (CR Doc. 180 at 42, 55.) There were five to ten people who came to the location yelling for the victim and Petitioner. (CR Doc. 180 at 155-157.) Police tried tracking techniques to find them. (*Id.* at 158.) Petitioner testified that, although the victim accompanied him voluntarily, her sister called shortly after they entered the bush. He purposely broke the victim's phone when he saw it was her sister calling. (CR Doc. 123 at 76.)

The victim testified that, after Petitioner broke her phone, she was violently forced by Petitioner to have anal and vaginal sex on the desert ground, in the cold. Afterwards, her back was covered in cactus needles. (CR Doc. 131 at 17-33; CR Doc. 124 at 79-80.)

Petitioner claimed that his wife voluntarily accompanied him into the bush and that she directed his actions. Petitioner testified that he had sex with the victim only because she insisted, despite his strong resistance. He testified that he did not tell the victim to dig

her grave, but that it was the victim who ordered him to dig the hole so they could shelter from the cold rain and hide from the people searching for her. He testified that he did not want to have sex and tried to avoid having sex, but the victim relentlessly sought it.

The jury did not believe Petitioner's explanation for the sex he admits he and the victim engaged in out in the bush. "She propositions me and I say to my wife, 'I don't think I can.' And she says, 'No, honey, please, let's make love.' And I tell her, 'No, I don't think I can.' . . . it just wasn't the proper setting." Nor did the jury believe that the victim would not take no for an answer. "I tell her again that I don't think I could even make love at the point because I am not emotionally, physically or any thinking of making love at that very moment. My wife continues to ask me and I tell her that I don't even think I could get aroused right now because it's just not the situation at the time." (CR Doc. 123 at 77.) Nor did the jury believe that, despite Petitioner's best efforts to avoid having sex, the victim would not relent. "She reaches out to me on her knees with her left hand and tells me sincerely, please, let's make love, and again I said I'll try but I don't think I could. So she took off the bottom of her pants. I took off my pants and we kneeled down, and I tried to make love but I wasn't aroused . . . I got back up and she asked me again, and I said, look, it's not that I don't want to make love, it's not that I can't make love, it's just kind of a spur of the moment, out-of-the-blue thing, and I suggest that if you could give me - - maybe try giving me a blow job. She did. It took about five seconds. I got aroused. We did it missionary style for about five minutes . . . It was what I would call a quickie." (*Id.* at 77-78.)

To reach its verdict, the jury believed the victim's testimony about the events surrounding the death threats. She testified that Petitioner forced her to dig a hole under a tree near Highway 160 to serve as her grave. (CR Doc. 140 at 31.) "This is where you are going to die. This is where you are going to be buried." (*Id.* at 32.) She testified that when a "cop unit" searching for her stopped on the road near the hole and shone a spotlight, Petitioner got on top of her, covered her mouth and told her not to say a word or scream. (*Id.* at 28.) The victim testified that she wanted the police or Raula to find her. (*Id.* at 26-

29.)

Petitioner's explanation for digging a hole to hide from the victim's family and the police as they frantically searched for her was that he and the victim were afraid of Raula finding them. Hiding from Raula was a "life-and-death situation." (CR Doc. 123 at 69-71.) He testified that it was dark, cold, and rainy, and he was exhausted. He testified that digging the hole was his way of obeying the victim who ordered him to find a place to keep them warm. He testified that they dug a hole under a tree to shelter the two of them to stay warm. (*Id.* at 92-94.) The shelter was built for warmth and to avoid detection, "as my wife wished." (*Id.* at 94.)

When Petitioner was impeached at trial with his prior statement to the FBI, he changed his testimony about the number of times he and the victim had sex. He at first denied having sex more than once with the victim that night. However, after being confronted with his statement to FBI Agent Sutherland, he admitted that he had sex with the victim multiple times. (CR Doc. 169 at 71-72.) He described the first sexual encounter as a quickie. He testified that leading up to another sexual act, the anal sex, there was no conversation. The anal sex occurred as the result of body language between a husband and wife. He didn't know she was laying in cactus but discovered the next day that her back was covered with thorns. (CR Doc. 123 at 73-74; CR Doc. 124 at 69-76.) The jury did not believe Petitioner's testimony and, given his trial testimony, there was nothing counsel could have done to change the outcome of the trial.

In addition to the inconsistencies within his testimony, an inherent problem with Petitioner's claims that his counsel missed finding exonerating evidence is that he has not described any allegedly missed exonerating evidence that is material or relevant. He has not shown that there is any evidence that should have been discovered that could have probably changed the outcome of the trial. This is not a case of "who done it" or "where was it done." Petitioner admitted in his trial testimony to having committed the acts upon which the charges are based. The jury did not believe his explanations.

There has been no showing that any examination of the physical evidence Petitioner

claims his attorneys should have performed was necessary to meet the objective reasonable standard or that any examination would have resulted in the discovery of evidence that would have supported his consent defense and likely changed the outcome of the trial. Petitioner offers no reason, other than his speculation, that had the crime scene been explored and had the footprints and other physical evidence been preserved, the outcome of the trial probably would have been different. The R&R did not err. Objection 9 is overruled.

XIV. Objection 10

In Objection 10, Petitioner argues the R&R erred when it did not accept his claim that he was framed, and the DNA evidence of the blood on the victim's blouse would have exonerated him. He claims a DNA examination of the victim's clothes would have established that it was his blood, not the victim's, on her clothes.

The jury believed the victim's testimony that she was forced into the wilderness on a cold, dark, and rainy night, barefoot with a severely injured ankle, threatened with death and repeatedly raped. The jury did not believe Petitioner's testimony that he took her by force into the wilderness for her own good, to protect her from CPS and a boyfriend, who he feared could be in the area. The jury did not believe Petitioner that the sex was consensual, that the victim, not he, wanted to engage in vaginal and anal sex while she lay on the cold hard ground in the rain with cactus thorns beneath her. The jury did not believe Petitioner's testimony that he gave in after the victim repeatedly begged for sex, out of respect for her as a loving husband. (CR Doc. 123 at 70-87, 93-97; CR Doc. 124 at 74-76.)

Petitioner has not shown that, given the facts of his case, any attorney acting at the objective standard of reasonableness would have requested a DNA test. At trial, neither party presented evidence nor argued that "there was significant bleeding." (CR Doc. 139 at 2.) Petitioner testified about substantial physical and sexual contact between the victim and him. Petitioner has not offered evidence, other than his speculation, about what the DNA test of the blood found on the shirt would have revealed. Most importantly, though,

he has not shown that the outcome of the trial probably would have been different if the DNA test would have shown that the blood on the victim's clothes was his. Objection 10 is overruled.

XV. Objection 11

Objection 11 argues that the R&R erred by not finding Petitioner's trial counsel was ineffective for failing to "put on evidence of the (fake) victims alleged father's alleged attempt to murder Movant." (Doc. 59 at 18.) Petitioner's trial counsel, Ms. Anderson, explained the strategy in directing Petitioner away from accusations against the victim's father. She explained that she focused Petitioner's testimony on relevant reasons why he thought the victim's father disapproved of Petitioner's relationship with the victim, and the victim's practice of spending time with Petitioner despite her father's strong and outspoken disapproval, evidence that was directly related to the defense strategy to establish the victim's motivation to lie. (CR Doc. 123 at 124-129; Doc. 32-1 at 11, ¶ 24.) The R&R correctly found that Defense counsel's approach reasonably and strategically focused on evidence that was corroborated by multiple witnesses, such as the enmity the victim's father had for Petitioner and the impact this might have on the witnesses' motivation to fabricate, rather than on Petitioner's uncorroborated claim that the victim's father had attempted to kill him by sabotaging a vehicle.

Though unclear from the objection, Petitioner seems to argue that Ms. Anderson elected not to speak with the victim's father due to a potential conflict of interest. (Doc. 5 at 13-14.) This is not an issue raised in the § 2255 motion and therefore must be denied. Objections to the R&R are not the place to assert new claims. Nonetheless, the argument fails on its merits. Petitioner has not shown that Ms. Anderson actively represented conflicting interests in a manner that affected her performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

The R&R correctly found that Petitioner failed to establish either prong of the *Strickland* test. Objection 11 is overruled.

XVI. Objection 12

In his twelfth objection, Petitioner argues that the R&R erred by not finding that his trial counsel provided ineffective assistance by not introducing evidence of "the (fake) victims and her sisters' motives to lie." (Doc. 59 at 19.) However, the R&R points out counsel's cross examination of the victim and her sisters on their motives to lie and use of the motives to lie in her closing arguments. (Doc. 51 at 29.) The R&R correctly found that the record establishes Defense counsel made the victim's and her sisters' motives to lie a primary element of the defense. (*Id.* at 30.) Accordingly, the R&R correctly found that Petitioner failed to establish either prong of the *Strickland* test. Objection 12 is overruled.

XVII. Objections 13, 14 and 15.

In these three objections, Petitioner complains that the R&R erred by not finding his counsel ineffective for not seeking out and presenting evidence that the victim suffered injuries at the 7-Eleven and in the manner he described. He complains that his attorneys were ineffective for not understanding which gas station from which to seek a security video. He claims the video would show the victim injured herself, before he took her into the wilderness, when she fell at the 7-Eleven. He claims that this would have been proven by the store's security video. Petitioner contends that his attorneys were ineffective for going to the wrong locations without consulting with him about where the "exculpatory video" could be found. (Doc. 59 at 19.) He argues the prosecutors put on the best liars and the best perjurers to testify about the victim's injuries and that his lawyers should have called witnesses to support his clams about how the victim was really injured.

The R&R correctly explained that, contrary to Petitioner's claim, his counsel on direct examination asked Petitioner questions that established in detail his recollection of each of the circumstances identified above. (CR Doc. 123 at 38 (the victim falls into the car door); *Id.* at 61-66 (Marcella's attack of the victim); *Id.* at 66-69 (Marcella called Raula McCartney); *Id.* at 74, 79, 87 (the victim injured her ankle by stepping on a dirt clod); *Id.* at 84-86, CR Doc. 124 at 21-22, 146, 151-152, RT 9/14/2016 (Movant repeatedly struck the victim to keep her awake and prevent her from overdosing).

The R&R found the strategy explained in Ms. Anderson's declaration to be reasonable. Ms. Anderson explained that the Defense had decided that the "most viable defense strategy was to: (1) question, or attempt to discredit, the credibility of the alleged victim, her ability to recall, and her motive to lie; and (2) question the source of her injuries." (Doc. 32-1 at 5 ¶ 10.) The R&R correctly found that Ms. Anderson's declaration explained that she expected Petitioner to testify about the events of October 4 and 5, 2015, and about his position on why the victim would be motivated to fabricate her allegations against him. (*Id.* at 5-6 ¶ 10.)

The R&R pointed out that, despite Petitioner's assertions to the contrary, Ms. Anderson argued in her closing that the physical evidence was "perfectly consistent" with Petitioner's testimony about how the victim received her injuries. She argued that the jury should resolve reasonable doubt about how the victim received her injuries in favor of Petitioner. (CR Doc. 134 at 42, RT 9/14/2016.) The R&R also discussed Ms. Anderson's argument reminding the jury of Petitioner's description of Marcella's attack of the victim in the car and that Marcella had called Raula for help. (*Id.* at 46-47, 48.) Ms. Anderson's closing also emphasized Petitioner's explanation that he had no alternative to keeping the victim from overdosing other than shaking her to revive her, holding her up by her face, and hitting her on both sides of her head to get her to respond after she had apparently blacked out. (*Id.* at 53-55, 57.) Ms. Anderson's closing further highlighted Petitioner's explanation that the victim was wearing Petitioner's boots when she twisted her ankle. (*Id.* at 57.) Ms. Anderson asserted that there was no reason to believe this accident was Petitioner's fault. (*Id.* at 57-58.)

The R&R determined that the defense team exercised due diligence in its investigation and made strategic decisions about which petitioner now complains. Petitioner has offered no evidence that counsel's preparation or strategy failed to meet the objective reasonable standard for criminal defense attorneys. Ms. Anderson explained that Petitioner's defense team interviewed the "percipient witnesses." (Doc. 32-1 at 6 ¶ 11.) She stated that the Defense expected the prosecution to call Marcella as a witness to testify

she had seen Petitioner assault and kidnap the victim on October 4, 2015, and had "prepared a cross-examination designed to both impeach [Marcella] regarding the alleged assault and kidnapping and draw out helpful information," including the victim's relationship with their father, their father's disapproval of the victim's relationship with Petitioner, and the victim's actions intended to conceal her continuing relationship with Petitioner from their father. (*Id.* at 10 ¶ 23.) When the prosecution decided not to call Marcella, the Defense team considered whether to call her as a defense witness, but elected not to, concluding that "her testimony would do more harm than good[]" because Marcella was likely to present as "a third eyewitness to inculpate [Petitioner] in a violent assault and kidnapping" which could only bolster the prosecution's case. (*Id.*) Ms. Anderson explained that Marcella's testimony might have been "acceptable damage if she also had crucial evidence to provide that furthered other aspects of our theory of the case and that we could not get in through other sources." (*Id.* at 10-11.)

After concluding that evidence favorable to the Defense had already come in during the testimony of other witnesses, the Defense determined it would be too risky to call Marcella because her testimony could bolster the victim's trial testimony. (*Id.*) The R&R correctly concluded that Defense counsel's decision not to call Marcella was a reasonable strategic decision. Petitioner has not offered evidence to the contrary. Petitioner fails to show that Defense counsel's strategic decisions fell below an objective standard of reasonableness or that but for counsel's inaction, the result of the trial would probably have been different.

Petitioner complains that the R&R erred by failing to find that his attorneys were ineffective for not locating or interviewing certain witnesses or consulting with him about a map of the area so they could find the 7-eleven security tapes. But there is no evidence that there was an operable security camera in the parking lot, that any such camera would have caught on video activities of the victim in the parking lot on the date in question, how long such video would have been available to be retrieved, or, if such video ever existed, that it contained exonerating information. Again, Petitioner presents no evidence that

supports his argument. Additionally, Ms. Anderson's explanations establish that the Defense team "spent considerable time and resources" unsuccessfully seeking to locate and interview the witnesses, including the driver of the truck who picked up Petitioner and the victim on the night of October 4, 2015, whom Petitioner calls "Rickie Todachinee," (Doc. 32-1 at 7 ¶ 16) and Nikki Tallis, who Melinda talked to (CR Doc. 180 at 41-42).

After reviewing the efforts made by Defense counsel, the R&R correctly applied the "strong presumption" that Defense counsel acted within the "wide range" of reasonable professional assistance and concluded that Defense counsel's efforts to locate witnesses and evidence was not objectively unreasonable. Petitioner has not shown a reasonable probability that with the testimony of either of these witnesses the result of his trial would have been different.

Petitioner has not shown that any of the potential witnesses would have supplied helpful testimony. His self-serving statements are not evidence. *See Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000). Petitioner has not provided an affidavit from any potential witnesses stating what he or she would attest to. Moreover, there is no evidence that any of his missing witnesses would be willing to testify. *See United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (no ineffective assistance based upon counsel's failure to call a witness where, among other things, there was no evidence in the record that the witness would have testified). Petitioner has failed to demonstrate either deficient performance by Defense counsel or prejudice regarding the Defense's decision not to call these witnesses or the failure to secure the alleged 7-Eleven security camera video. Objections 13, 14 and 15 are overruled.

XVIII. Objection 16

In his sixteenth objection, Petitioner faults the R&R for not finding that his counsel was ineffective for not obtaining the cell phone GPS data from the victim's cell phone that was left in the wilderness after Petitioner purposely broke it. He claims that this cell phone data would have established that his version of the facts was accurate. Ms. Anderson agrees it is possible the cell phone data might have proved helpful to Petitioner's case and, because

she does not recall what she told Petitioner about the cell phone, she has no reason to doubt Petitioner's statement that she told him it was irretrievable because it was a pre-paid Walmart phone. (Doc. 32-1 at 7 ¶ 15)

The R&R correctly determined that the location information that the cell phone could have possibly provided was not relevant to any contested issue in the case. The R&R correctly determined that, even if counsel should have found the phone, there has been no showing that, but for counsel's inaction, the result of the trial would probably have been different. Objection 16 is overruled.

XIX. Objection 17

In his seventeenth objection, Petitioner claims the R&R erred in its factual determinations that Melinda, the victim's sister, was not coerced into making "the factually impossible accusation that [Petitioner] punched/knocked out O.C. (the victim) next to the car" and "grabbed onto O.C. ankles and then literally dragged O.C. away, on her back side and dragged her out into the desert[.]" (Doc. 59 at 22.) Petitioner argues that his attorneys were ineffective for not finding physical and medical evidence inconsistent with that testimony.

Again, Petitioner's objections are not supported by evidence. Petitioner's alleged inconsistencies do not prove that Melinda was coerced into lying to convict him. His alleged physical evidence is not probative. Petitioner's disagreement with the jury provides no basis for the Court to reject the findings of the R&R. Petitioner does not explain what conduct of his attorneys did not meet the objective standard. Neither prong of the *Strickland* test is met. Objection 17 is overruled.

XX. Objection 18

In objection eighteen, Petitioner argues that the R&R should have addressed whether he is entitled to Good Samaritan immunity. Petitioner does not define or cite authority for his claim that he is entitled to any immunity. There is no evidence offered in the motion (or at trial) that any of Petitioner's conduct would qualify for any immunity.

Petitioner also argues that the FBI distorted and fabricated the tape recording of his

interview. Petitioner does not support this accusation with evidence. His arguments and speculation are not evidence.

Petitioner also argues that his attorney stipulated to the admission of the tape-recorded interview without clearing it with him. Petitioner has not shown that there was anything that his attorneys should have done or that, had an objection been raised, it probably would have been granted and, if granted, the outcome of trial probably would have been different. The R&R correctly found that Petitioner failed to establish either prong of the *Strickland* test. Objection 18 is overruled.

XXI. Objection 19

The nineteenth objection claims the R&R erred by failing to find Defense counsel ineffective for not asking a witness, N.N. Clifton Gilbert, if he found Petitioner's version of actual innocence to be truthful and that he did not charge him because he believed he was innocent. Apparently, Petitioner believes Mr. Gilbert has some expertise and should have been asked to offer an expert opinion on Petitioner's guilt. Such testimony would also vouch for Petitioner's credibility on that subject.

There is no evidence that this witness would have testified as Petitioner claims. Additionally, the cross-examination that Petitioner claims should have occurred would have been inappropriate under the Federal Rules of Evidence. Expert witnesses are not allowed to give opinion testimony about their beliefs of guilt or innocence. The law does not allow opinion testimony on how the jury should decide the case. Additionally, opinion testimony that does nothing but vouch for the credibility of another witness encroaches on the jury's exclusive function to make credibility determinations and therefore does not assist the tier of fact as required by Rule 702. *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir.1999); *see also* Weinstein's Federal Evidence § 704.05. Objection 19 is overruled.

XXII. Objection 20

In this objection, Petitioner argues that the R&R, at page 42, erroneously found the victim's sisters, Melinda and Marcella, not to be on alcohol or methamphetamine and the

victim to be on alcohol, illegal pain pills, and marijuana. The R&R correctly pointed out, beginning at page 42, that before trial, the Court had granted motions in limine precluding the evidence of the victim's September 2013 misdemeanor conviction for intoxication and assault. The Court's ruling on the motions in limine also precluded the admission of evidence of the victim's or witnesses' use of alcohol prior to the date of the events in this case. The Court also ruled that witness testimony that the victim became aggressive six years earlier when she was drunk was not admissible. However, the Court ruled that evidence of the victim's, the witnesses', and Petitioner's drinking and/or drug use on the date in question was admissible, and that evidence was thoroughly presented to the jury. (CR Doc. 140 at 15, 57-58, 83-84, 85-88, 104-106, RT 9/07/2015; CR Doc. 180 at 53-54, 56, 60, 113, RT 9/08/2016.) Nothing in the R&R indicates it found the victim and her sisters were not drinking and/or using drugs the day of the events in question.

The allegations in Petitioner's objection are not borne out by the record and do not accurately reflect the findings of the R&R at pages 42-44. This objection is baseless. Objection 20 is overruled.

XXIII. Objection 21

This objection argues that the R&R erroneously or failed to address Petitioner's claim that his attorneys were ineffective in their cross-examination of the victim about her injuries because they did not have the 7-Eleven security camera tapes to impeach her. Petitioner claims these tapes would have shown that the victim's injuries were caused when she fell in the 7-Eleven parking lot.

Petitioner's objections are again based on his speculation that a security camera would have captured the victim and about what the camera might have shown. Other than his allegations about how the victim was injured, which were rejected by the jury, there is no new evidence presented to support this objection. This objection is baseless. The Court has already addressed Petitioner's claim concerning the alleged failure to obtain the security camera footage. For those same reasons, Objection 21 is overruled.

XXIV. Objection 22

In this objection, Petitioner alleges that the R&R erroneously applied the *Strickland* standard to his claim of ineffective assistance of counsel based on counsel's failure to hire a "photograph expert." This objection suffers from the same defect as other objections. Petitioner presents no evidence that supports his argument or that those alleged failures meet either prong of the *Strickland* test. There is no basis for the Court to find that an objective standard would have his counsel employ a "photograph expert" to essentially photoshop prejudicial material from the Government's photos or that hiring such an expert would have probably changed the outcome of the case. Objection 22 is overruled.

XXV. Objection 23

The twenty-third objection again claims that the R&R erroneously applied the *Strickland* standard. This objection alleges that Petitioner's counsel was ineffective for failing to interview the victim's medical doctor before trial to support Petitioner's exculpatory explanation about the cause of the victim's injuries. This objection suffers from the same defect as other objections. Petitioner presents no evidence that supports his argument or that those alleged failures meet either prong of the *Strickland* test. Petitioner offers no evidence that the standard of care required such an interview or what exonerating evidence the doctor would have provided had he been interviewed as Petitioner claims he should have been. This objection is baseless. Objection 23 is overruled.

XXVI. Objection 24

The twenty-fourth objection alleges that the R&R erred by accepting facts alleged by witnesses at trial, the victim, and her sisters. The jury found Petitioner guilty. In doing so, it accepted the testimony of those witnesses and rejected that of Petitioner. Petitioner's motion and his objection offers no new evidence or any reason for the R&R to have found that the witnesses were lying. Petitioner's unsupported allegations that the witnesses lied does not raise any valid claim that his "constitutional rights were violated." Objection 24 is overruled.

XXVII. Objection 25

The twenty-fifth objection alleges that Petitioner's attorneys were ineffective for not bargaining for an *Alford* plea that would have allowed him to be sentenced with a ten-year cap but maintain his claim of actual innocence. Petitioner presents no evidence that supports his argument that those alleged failures meet either prong of the *Strickland* test. There is no evidence that the Government would have agreed to such a plea agreement or that Petitioner would have accepted it.

Ms. Anderson explained the plea negotiations in her declaration. (Doc. 32-1 at 5 ¶ 9.) Petitioner rejected all offers from the prosecution and maintained that he would not take a plea. Ms. Anderson stated she had reviewed the offers with Petitioner on April 27, 2016, and that he "respectfully declined" them. That decision was consistent with his position previously that "he had no interest in any plea for any amount of time." (*Id.*) Even at the settlement conference Ms. Anderson arranged with the prosecution during which Petitioner was able to speak directly with the prosecutor, Petitioner maintained his position that he would not enter into a plea agreement. (*Id.*) Petitioner rejected all plea offers and insisted on going to trial. Objection 25 is overruled.

XXVIII. Objection 26

Objection 26 alleges that the R&R erroneously applied the *Strickland* standard to Petitioner's claims that his counsel did not meet with him to prepare for trial in any meaningful way. This objection is not supported by any facts. This objection is a summary of other overruled, unsupported arguments made by Petitioner in his objections to the R&R. This objection is baseless. Objection 26 is overruled.

XXIX. Objection 27

Objection 27 is a claim that the R&R erred in its consideration of Petitioner's "freestanding claim of Actual Innocence." The standard for establishing entitlement to relief on a freestanding actual innocence claim is "'extraordinarily high.'" *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)). To prevail on such a claim, a movant "must go beyond demonstrating doubt about his guilt and must affirmatively prove that he is probably innocent." *Id.* This standard is

even higher than that applied by courts considering a miscarriage of justice exception to procedural default, which "is not an independent avenue to relief[,]" but rather, "if established, . . . functions as a 'gateway,' permitting a habeas petitioner to have considered on the merits claims of constitutional error that would otherwise be procedurally barred." *Id.* at 477 (citing *Schlup v. Delo*, 513 U.S. 298, 315-16 (1995)).

Instead of producing evidence that affirmatively proves that he is probably innocent, Petitioner argues that the R&R erred by not providing evidence from the record "that can disprove any part of the Movant's crime scene reconstruction[.]" (Doc. 59 at 25.) Petitioner is confusing the burden of proof. It rests with him, not the Government nor the Magistrate Judge authoring the R&R. Petitioner fails to meet his burden of proof and has not presented information or facts sufficient to raise a question warranting an evidentiary hearing. Objection 27 is overruled.

XXX. Objection 28

In the twenty-eighth objection, Petitioner argues that the R&R erred by failing to apply the exclusionary rule to exclude the testimony of FBI Special Agent Sutherland. He argues that Sutherland's testimony should have been excluded because he lied under oath and because he coerced Melinda into a false statement about Petitioner. Petitioner argues that Sutherland's misconduct affected Petitioner's "credibility with the jury and trial court and appellate court and Supreme Court." (Doc. 59 at 26.)

The R&R correctly found that this claim was procedurally defaulted because it was not raised at trial. Because Petitioner has not demonstrated that he is actually innocent, his procedural default on this issue is not excused. Nonetheless, on the merits, his unsupported allegations that Sutherland was not truthful and that his testimony affected Petitioner's credibility is not evidence and does not establish any claim. Objection 28 is overruled.

XXXI. Objection 29

The twenty-ninth objection argues that the R&R erred by rejecting Petitioner's clam of prosecutorial misconduct. Petitioner claims the prosecution committed misconduct by framing him with his own blood for a crime committed by the victim's sister, Marcella.

He argues that the victim injured herself at the 7-Eleven and the prosecution committed misconduct by manipulating the jury when it chose not to call the real criminal, Marcella.

The R&R correctly determined that this claim was procedurally defaulted. The Court further points out that Petitioner's arguments are unsupported by any evidence other than his same assertions that were presented at trial and rejected by the jury. This habeas action is not intended to re-litigate the facts based on the same evidence heard by the jury. This objection is baseless. Objection 29 is overruled.

XXXII. Objection 30

Objection 30 argues that the R&R erred by failing to recommend an evidentiary hearing on physical evidence that Petitioner contends would exonerate him, such as the DNA of the blood on the victim's blouse, the GPS in the victim's broken cell phone, the crime scene, and a timeline.

An evidentiary hearing is not warranted if the record conclusively shows that Petitioner is either not entitled to relief or if, in light of the record, his claims are "palpably incredible or patently frivolous." *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (citing *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)). The petition, files, and record of the case conclusively show that Petitioner is entitled to no relief. A request to consider each of those items was raised in previous objections and found to be meritless. Petitioner has presented nothing to show that any of the items for which he seeks a hearing would be exonerating. In most cases, such information would be of no material relevance. Petitioner has not shown that there are any questions of material fact that warrant a hearing. Objection 30 is overruled.

XXXIII. Objection 31

Objection 31 argues that the R&R erred by failing to recommend a bail hearing. The R&R correctly concluded that "the Court need not reach the question of whether it is authorized to grant bail in this matter because Movant plainly has not established either the existence of special circumstances or a high likelihood of success." (Doc. 51 at 59.) This objection is baseless. Objection 31 is overruled.

XXXIV. Objections 32 and 33

Objections 32 and 33 are general objections to the R&R which argue that the R&R was wrong in its factual and legal conclusions and therefore should be overruled. The argument that the R&R could have found merit in Petitioner's claims does not establish the merits to any claim. Objections 32 and 33 are overruled.

XXXV. Motion to Clarify Counts 3 & 4 (and 6) are not Within Indian Country Within the Meaning of 18 U.S.C. § 1151(c)

The question of jurisdiction was discussed and resolved in Petitioner's Objection 2 above. No further clarification is necessary.

IT IS ORDERED as follows:

1. Petitioner's Objections to the R&R (Doc. 59) are **OVERRULED**.
2. The R&R (Doc. 51) is **ACCEPTED**.
3. Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 5) is **DENIED**.
4. Petitioner's Motion for Bail Hearing in Order to Grant Bail Pending a § 2255 Decision by the District Court (Doc. 47) is **DENIED.**
5. Petitioner's Motion to Clarify Counts 3 & 4 (and 6) are not Within Indian Country Within the Meaning of 18 U.S.C. § 1151(c) (Doc. 67) is **DENIED.**
6. Petitioner's Motions (Docs. 61, 63, 66) are **DENIED.**
7. A Certificate of Appealability is **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right.
8. The Clerk of the Court shall enter judgment accordingly and terminate this action.

Dated this 14th day of December, 2021.

Douglas L. Rayes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Eli Sloan
Petitioner,

v.

United States of America,
Respondent.

NO. CV-20-08133-PCT-DLR (DMF)
CR-15-08232-PCT-DLR

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED accepting the Report and Recommendation of the Magistrate Judge as the Order of this Court. Defendant's Motion pursuant to 28 U.S.C. 2255 to Vacate, Set Aside or Correct a Sentence is Denied. A Certificate of Appealability is denied because Petitioner has not made a substantial showing of the denial of a constitutional right. This action is hereby terminated.

Debra D. Lucas
District Court Executive/Clerk of Court

December 14, 2021

By s/ W. Poth
Deputy Clerk

FILED

SEP 30 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ELI SLOAN, Defendant-Appellant.	No. 21-17137 D.C. Nos. 3:20-cv-08133-DLR 3:15-cr-08232-DLR-1 District of Arizona, Prescott ORDER

Before: CLIFTON and VANDYKE, Circuit Judges.

Appellant's motions for an extension of time to file a motion for reconsideration (Docket Entry Nos. 12, 13) are granted. Appellant's combined motion for reconsideration and for reconsideration en banc is deemed timely filed.

Appellant's motions for leave to file an oversized motion for reconsideration (Docket Entry No. 14) and to correct typing errors (Docket Entry No. 16) are granted.

The motion for reconsideration is denied and the motion for reconsideration en banc (Docket Entry No. 15) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

All remaining motions and requests are denied as moot.

No further filings will be entertained in this closed case.

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