APPENDIX

D

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY DENG, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 22-15480 D.C. No. 2:21-cv-00546-SPL District of Arizona, Phoenix ORDER

Before: CLIFTON and VANDYKE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX

B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Tony Deng,
Petitioner
-vs-
David Shinn, et al.,
Respondents.

CV-21-0546-PHX-SPL (JFM)

Report & Recommendation on Petition for Writ of Habeas Corpus

I. MATTER UNDER CONSIDERATION

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), challenging his Arizona convictions on charges of sexual conduct with and sexual abuse of a minor, and his sentences, the longest of which are life sentences. Petitioner asserts ten grounds for relief. Grounds 4 and 7 contained stated law claims, which were dismissed on screening, the latter in its entirety. (Order 4/21/21, Doc. 5.) The following are the remaining claims:

1. his confession in the confrontation call was involuntary in violation of the Fifth Amendment;
2. his Fourth Amendment rights were violated during the confrontation call;
3. his Sixth Amendment right to counsel was violated during the confrontation call;
4. he was compelled to incriminate himself in violation of the Fifth Amendment when the confrontation call recording was admitted;
5. the interception of the confrontation call violated 18 U.S.C. § 2510 and thus, the admission of the intercepted call violated 18 U.S.C. § 2515;
6. his federal right to privacy was violated because the interception of the confrontation call was authorized under an allegedly unconstitutional Arizona law;
7. (dismissed);

8. ineffective assistance of pre-trial and trial counsel related to: (1) a motion to suppress; (2) a voluntariness hearing; (3) privacy rights; (4) expert's photographs; (5) initial appearance; (6) entrapment; and (7) specificity of the indictment.
9. ineffective assistance of appellate counsel related to: (1) non-suppression of a photo; (2) due process violations in confrontation call; (3) First Amendment violations in confrontation call; (4) insufficient evidence; (5) denial of bond; and (6) the issues in Ground 1.
10. he was deprived of due process when the Arizona Court of Appeals failed to conduct meaningful review and gave no findings of fact.

Respondents' Answer (Doc. 15) argues: (a) procedural default of Grounds 5, 6, 8(3), 8(5)-(7), and 9(2)-(6); (b) a *Stone* bar of Ground 2; (c) lack of merit under deferential review of Grounds 1, 3, 4, 8(1)-(2), 8(4), and 9(1); (d) non-cognizability of Ground 10. Petitioner's Reply (Doc. 17) argues fair presentation of his claims, lack of a full and fair litigation necessary to a *Stone* bar, and the merits of his claims. Petitioner submits an Affidavit (Doc. 18) in support of his Reply.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

During a recorded telephone call with his stepdaughter, then 16 years old, Petitioner admitted to "penetrating her vagina with his penis, performing and receiving acts of oral sexual contact, and using a sex toy with her." (Exh. R, Mem. Dec. 2/9/17 at ¶ 2.) (Exhibits herein are referenced as follows: to the Petition (Doc. 1) as "Exh. P-__"; and to the Answer (Doc. 15), as "Exh. ___".) Petitioner proceeded to trial with counsel and was convicted as charged on "ten counts of sexual conduct with a minor under the age of fifteen and one count of sexual abuse against a minor under the age of fifteen." (*Id.* at 1.) He was sentenced to various sentences, including two consecutive life sentences. Petitioner filed an unsuccessful direct appeal, and three unsuccessful post-conviction relief ("PCR") proceedings, the last of which presumably remains pending on petition for review before the Arizona Supreme Court.

III. APPLICATION OF LAW TO FACTS

A. EXHAUSTION, PROCEDURAL DEFAULT AND PROCEDURAL BAR

Respondents argue a procedural bar or procedural default of Grounds 5, 6, 8(3), 8(5)-(7), and 9(2)-(6). Generally, a federal court has authority to review a state prisoner's claims only if available state remedies have been exhausted. 28 U.S.C. § 2254(b) and (c). The burden is on the petitioner to show that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981). To exhaust his state remedies, the petitioner must have fairly presented his federal claims to the state courts. "A petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005). With regard to the forum, "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them.'" *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2005) (quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)).

Ordinarily, unexhausted claims are dismissed without prejudice. *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed to properly exhaust his available administrative or judicial remedies, and those remedies are now no longer available because of some procedural bar, the petitioner has "procedurally defaulted" and is generally barred from seeking habeas relief. Dismissal with prejudice of a procedurally defaulted habeas claim is generally proper absent a "miscarriage of justice" which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

Related to the concept of procedural default is the principle of barring claims actually disposed of by the state courts on state grounds. "[A]bsent showings of 'cause' and 'prejudice,' federal habeas relief will be unavailable when (1) 'a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.' " *Walker v. Martin,* 562 U.S. 307, 316 (2011).

1. Claims Unexhausted or Procedurally Barred

a. Ground 5 and 6

Petitioner argues **Grounds 5 and 6** (confrontation call violated federal statutes and federal right to privacy) were properly exhausted by fair presentation in: (1) his supplemental brief / motion for reconsideration on direct appeal (Exh. P-8); and (2) in his Petition for Review on direct appeal (Exh. T.) (Reply, Doc. 17 at 7.)

Petitioner's supplemental brief / motion for reconsideration (Exh. P-8) was filed by Petitioner on May 1, 2017, *after* the Arizona Court of Appeals had already issued its Memorandum Decision (Exh. R) on February 9, 2017. (*See* Exh. N, Docket at item 74.) "Submitting a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). Petitioner points to no authority for filing a post-decision supplemental brief in the Arizona Court of Appeals. Moreover, Petitioner waived these claims by not arguing them in his opening brief and thus they could not be properly asserted in a motion to reconsider. *State v. McCall*, 139 Ariz. 147, 164, 677 P.2d 920, 937 (1983). Finally, motions for reconsideration must be filed "no later than 15 days after entry of the decision." Ariz. R. Crim. Proc. 31.20(c). Petitioner filed this brief 81 days after the appellate court's decision.

Similarly, Petitioner's inclusion of the claims in his Petition for Review to the Arizona Supreme Court was not fair presentation. The Arizona Supreme Court generally will not consider issues raised for the first time before it, although it has the discretion to do so. *See Town of South Tucson v. Board of Supv'rs of Pima County*, 52 Ariz. 575, 84 P.2d 581 (1938).

> Academic treatment accords: The leading treatise on federal habeas corpus states, "Generally, a petitioner satisfies the exhaustion requirement if he properly pursues a claim (1) throughout the entire direct appellate process of the state, or (2) throughout one entire judicial postconviction process available in the state."

Id. (quoting Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure*, § 23.3b

(4th ed. 1998) (emphasis added)). In *Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004), the court reiterated that to properly exhaust a claim, "a petitioner must *properly* raise it on every level of direct review." *Id.* at 916 (emphasis added).

Petitioner fails to show that he *fairly* presented Grounds 5 and 6 to the Arizona Court of Appeals on direct appeal, and thus his state remedies were not properly exhausted.

However, both sets of parties assert these claims were again raised by Petitioner in his PCR Notice (Exh. OO) in his Third PCR proceeding. (*See* Answer, Doc. 15 at 15; Reply, Doc. 17 at 7-8.) Respondents argue that these claims were then procedurally barred by the trial court as precluded.

The undersigned finds only **Ground 5** was fairly presented in that proceeding. (*See* Ex. OO at 3-A, ¶ 3 (arguing violation of federal statutes). Moreover, the undersigned finds it was rejected as "raisable on direct appeal, and therefore [ ] precluded" under Rule 32.2(a)(3). (Exh. PP, Order 7/6/20 at 3.)

Petitioner objects that he never actually presented any claims to the PCR court, having filed only his PCR Notice, and not an actual PCR petition. (Reply, Doc. 17 at 7-8.) But, as observed by the PCR court, Petitioner's PCR notice was required to adequately explain for his claims the "reasons for their untimely assertion." (Exh. PP, Order 7/6/20 at 3.) Thus, the rejection of this claim for failing to do so was a proper application of the state's waiver bar.[1]

Petitioner bears the initial burden of showing this procedural bar was not independent and adequate to bar habeas review. *Bennett v. Mueller*, 322 F.3d 573, 584-585 (9th Cir.2003). He offers nothing to do so.

Conversely, although Petitioner referenced a right of privacy in his 3rd PCR Notice, he did not fairly present it as the federal claim he asserts in **Ground 6**. Petitioner argued:

1. "A.R.S. § 13-3012(9) is unconstitutional because its application completely

[1] To the extent that this Court could conclude Ground 5 was *not* fairly presented, and thus procedurally barred, in the 3rd PCR, it would simply be unexhausted, now procedurally defaulted, and thus subject to dismissal on that basis.

eliminated the non-consenting party's (defendant) right to privacy. (*Id.* at 3-A, ¶ 2.)

2. "Defendant in this case had a legitimate expectation of privacy during the confrontation call and his right to privacy is an individual constitutional right which cannot be vicariously waived by anyone including the consenting party of the intercepted phone call." (*Id.* at 3-B, ¶ 9.)
3. "There has been a significant ruling on the private affairs clause of Ariz. Const. art. II § 8[2] by the Court of Appeals/division 2. Defendant probably entitled to protection under this clause because his private phone call falls squarely under the definition of private affairs. (*Id.* at ¶ 10.)

Petitioner did not provide anything to indicate that the constitutional violation asserted was of the federal Constitution. Indeed, he explicitly referenced the Arizona Constitution. Nor did he indicate that the referenced right to privacy was a federal right.

Nor did the PCR court construe this as a claim of a federal violation,[3] summarizing the claim as asserting a violation of "his rights to privacy," and inferring that the obliquely referenced appellate decision was *State v. Mixton*, 247 Ariz. 212, 447 P.3d 829 (Ct. App. 2019), *vacated*, 250 Ariz. 282, 478 P.3d 1227 (2021).

Nor was the inferred reference to *Mixton* sufficient to fairly present a federal claim. *Mixton* engaged in discussions of Fourth Amendment issues, as well as Arizona's similar Article II § 8 protections for "private affairs." That the discussion included federal Fourth Amendment issues did not make the citation fair presentation of the federal claim.

> For a federal issue to be presented by the citation of a state decision dealing with both state and federal issues relevant to the claim, the

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[2] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8.

[3] Although fair presentation is the normal mode of establishing exhaustion of state remedies, it is not the only method. Rather, a petitioner's state remedies are exhausted where the state courts have reached and passed on the merits of a federal claim, regardless whether the petitioner had fairly presented the claim to the state court. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

> citation must be accompanied by some clear indication that the case involves federal issues. Where, as here, the citation to the state case has no signal in the text of the brief that the petitioner raises federal claims or relies on state law cases that resolve federal issues, the federal claim is not fairly presented.

Casey v. Moore, 386 F.3d 896, 912 n. 13 (9th Cir. 2004). Petitioner provided no signal that his reference was to the federal analysis.

It is true that citation to state authorities applying a state constitutional provision that is treated as *identical* to the federal constitutional guarantee may amount to fair presentation of the federal claim. Petitioner bears a high burden of showing an identity between the state and federal claims. "In the absence of an affirmative statement by the [state supreme court] that it considers a particular state and federal constitutional claim to be identical, rather than analogous ... Petitioner was required to raise his federal claims affirmatively; we will not infer that federal claims have been exhausted." *Fields v. Waddington*, 401 F.3d 1018, 1024 (9th Cir. 2005). *Mixton* itself recognized the state and federal protections were not identical: "our supreme court has left open the possibility that article II, § 8 rights extend beyond those that have been found in the Fourth Amendment in circumstances other than warrantless physical intrusion into the home." *Mixton*, 247 Ariz. at 220, 447 P.3d at 837.

Accordingly, Petitioner never fairly presented his federal claim in Ground 6, and his state remedies were not properly exhausted.[4]

b. Grounds 8(3), 8(5)-(7), and 9(2)-(6),

With regard to his ineffective assistance claims in Grounds 8(3), 8(5)-(7), and 9(2)-(6), Petitioner argues that although these subclaims ("captions") are "new allegations or facts," they are not separate grounds for relief, but part of unified claims of ineffective assistance against pretrial, trial and appellate counsel. He argues he asserted ineffective

[4] To the extent that this Court could conclude the claim in Ground 6 *was* fairly presented in the 3rd PCR proceeding, then the application of the state's waiver bar would render it procedurally barred, and thus subject to dismissal on that basis.

assistance of these attorneys, and thus his claims were properly raised in his appellate court Petition for Review (Exh. EE) in his first PCR Proceeding, and his Arizona Supreme Court Petition for Review (Exh. JJ) in that proceeding. (Reply, Doc. 17 at 8-9.)

Petitioner is correct that new factual allegations do not necessarily render a claim unexhausted. But a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Thus, a petitioner may not broaden the scope of a constitutional claim in the federal courts by asserting additional *operative* facts that have not yet been fairly presented to the state courts. *Brown v. Easter*, 68 F.3d 1209 (9th Cir. 1995).

In ineffective assistance claims, the instances of deficient conduct are operative facts. Thus, ineffective assistance claims are not fungible, and must each be specifically argued. *See Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982) (presentation of "additional facts of attorney incompetence" transformed claim into one not presented to state court); and *Carriger v. Lewis*, 971 F.2d 329, 333-34 (9th Cir. 1992) (rejecting argument that presentation of any claim of ineffectiveness results in fair presentation of all claims of ineffective assistance).

Because Petitioner fails to show that he *fairly* presented to the Arizona Court of Appeals his claims in Grounds 5, 6, 8(3), 8(5)-(7), and 9(2)-(6), and he did not properly exhaust his state remedies on these claims.

2. Procedural Default

Respondents properly argue that Petitioner may no longer present his unexhausted claims to the state courts under Arizona's waiver ("preclusion") bar[5] set out in Ariz. R. Crim. Proc. 32.2(a)(3) and time limit bar, set out in Ariz. R. Crim. P. 32.4. (Answer, Doc.

[5] None of Petitioner's claims are of the type that require an explicit, personal waiver, rather than simple failure to timely raise them. *See Stewart v. Smith*, 202 Ariz. 446, 449-450, 46 P.3d 1067, 1070-1071 (2002) (personal waiver required only for: (1) waiver of the right to counsel, (2) waiver of the right to a jury trial, and (3) waiver of the right to a twelve-person jury under the Arizona Constitution).

15 at 12-15.) Consequently, Petitioner is barred from raising them on habeas. *Reed*, 468 U.S. at 11.

Petitioner protests that preclusion under Ariz. R. Crim. Proc. 32.2(a)(2) does not bar habeas review, citing *Ceja v. Stewart*, 97 F.3d 1235, 1252-53 (9th Cir. 1996). Petitioner fails to recognize that Arizona's Rule 32.2 deems "precluded" both claims that are waived for failure to raise them earlier, Rule 32.2(a)(3), and claims that were "finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding," Rule 32.2(a)(2). *Ceja* recognized the dismissal under Rule 32.2(a)(2) was a recognition that state remedies had been exhausted. In this case, however, Respondents rely on the waiver provision in Rule 32.2(a)(3).[6]

Petitioner proffers nothing to show that his unexhausted claims are not subject to the waiver and timeliness bars, nor that they are governed by any of the exceptions to those bars under Ariz.R.Crim.P. 32.1(d) through (h). The undersigned concludes the bars apply, and the exceptions do not.

3. Cause and Prejudice

If the habeas petitioner has procedurally defaulted on a claim, or it has been procedurally barred on independent and adequate state grounds, he may not obtain federal habeas review of that claim absent a showing of "cause and prejudice" sufficient to excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

Petitioner makes no argument of cause and prejudice. However, he does argue in Ground 9(6) that appellate counsel was ineffective in failing to raise the claim in Ground 1. But, as discussed hereinabove, Petitioner has procedurally defaulted his claim of ineffective assistance of appellate counsel in Ground 9(6). "To constitute cause for procedural default of a federal habeas claim, the constitutional claim of ineffective

[6] Similarly, in rejecting the claim in Ground 5 as "precluded", the PCR court relied on the waiver bar in Rule 32.2(a)(3). (*See* Exh. PP, Order 7/6/20 at 3.) It applied Rule 32.2(a)(2) only to the claims "of coercion, lack of consent to the call, and the absence of counsel." (*Id.*)

assistance of counsel must first have been presented to the state courts as an independent claim." *Cockett v. Ray*, 333 F.3d 938, 943 (9th Cir. 2003). "[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Summary re Cause and Prejudice – Based upon the foregoing, the undersigned concludes that Petitioner had failed to establish cause to excuse his procedural defaults.[7]

4. Actual Innocence

Failure to establish cause may be excused "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (emphasis added). A petitioner asserting his actual innocence must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Here, Petitioner makes no claim of actual innocence, and offers no "new reliable evidence" of his innocence. Accordingly his procedurally defaulted and procedurally barred claims in Grounds 5, 6, 8(3), 8(5)-(7), and 9(2)-(6) must be dismissed with prejudice.

That leaves for consideration the claims in Grounds 1, 2, 3, 4, 8(1)-(2), 8(4), 9(1), and 10.

B. GROUND 1 – INVOLUNTARY CONFESSION/SELF-INCRIMINATION

In Ground 1, Petitioner argues his confession in the confrontation clause was involuntary in violation of the Fifth Amendment, because it was obtained through trickery (the victim's exaggeration of her distress, and the privacy of the call), deception, and a

[7] Having found no "cause" this court need not also examine the merits of Petitioner's claims or the purported "prejudice." *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir.1991).

false promise of privacy, done by the victim who was acting as a state agent. Respondents argue the state court's rejection of this claims was on the merits, is entitled to deference, and must be upheld. (Answer, Doc. 15 at 24-28.)

State Court Decision - The Arizona Court of Appeals[8] ruled:

> ¶8 Deng argues the confrontation call was not voluntary because the victim used psychological pressure at the behest of the police to overcome his will and illicit incriminating statements relevant to her allegations of sexual assault.
>
> * * *
>
> Nevertheless, "[t]o be admissible, [Deng's] statement must be voluntary, not obtained by coercion or improper inducement." *State v. Ellison*, 213 Ariz. 116, 127, ¶ 30 (2006); A.R.S. § 13-3988. The State has the burden of proving, by a preponderance of the evidence, that a statement was voluntary. *State v. Amaya–Ruiz*, 166 Ariz. 152, 164 (1990). A statement was involuntarily made if there was (1) "coercive police behavior" and (2) "a causal relation between the coercive behavior and defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, 335-36, ¶ 44 (2008). In evaluating voluntariness, "the trial court must look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant [was] overborne." *State v. Lopez*, 174 Ariz. 131, 137 (1992).
>
> ¶10 The trial court did not err in determining that Deng's admissions to the victim were voluntary. The court listened to the recorded phone call and was able to evaluate the tone and nuances of the conversation. The court properly considered the totality of the circumstances and found Deng's statements to the victim during the recorded phone call were voluntary, pointing to the instances during the call when he could have, and twice did, end the conversation. **The court also concluded that the victim "engaged in trickery at the behest of the State apparently, but that does not amount to coercion."**[3] Likewise, the court properly could conclude the demands of the victim, including her expressed urgency to speak to Deng about past sexual abuse, did not exert upon him such pressure as to render his statements to her involuntary. *See State v. Keller*, 114 Ariz. 572, 573 (1977) (finding that the victim's demands for the return of her property, including a threat to call police, did not exert such pressure to render defendant's statements involuntary). Nor are we persuaded by Deng's argument that his "unique relationship" to the victim, standing in loco parentis to the victim, rendered his statements involuntary. *See State v. Wright*, 161 Ariz. 394, 398 (App. 1989) (holding that the mere fact that the police officer who questioned the defendant was his father was not enough to render the confession involuntary).

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[8] Petitioner also sought review by the Arizona Supreme Court, but that court issued a summary denial of review. (Exh. U, Order 11/30/17.) In evaluating state court decisions, the federal habeas court looks through summary opinions to the last reasoned decision. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). For this claim, that is the Arizona Court of Appeals' Memorandum Decision in Exhibit R.

(Exh. R, Mem. Dec. 2/9/17 at ¶¶ 9-10 (footnote in original) (emphasis added).) The included footnote 3 provided: "Because there was no evidentiary hearing requested or held on the motion to suppress, the source for the observation that any "trickery" in the call was "at the behest of the State" is unclear on appeal." (*Id.* at ¶ 10, n. 3.)

Standard of Review - Where the state court has rejected a claim on the merits, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Woodford v. Visciotti*, 537 U. S. 19, 24– 25 (2002) (*per curiam*). Rather, in such cases, 28 U.S.C. § 2254(d) provides restrictions on the habeas court's ability to grant habeas relief based on legal or factual error. To justify habeas relief based on legal error, a state court's merits-based decision must be "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" before relief may be granted. 28 U.S.C. §2254(d)(1).

Similarly, the habeas courts may grant habeas relief based on factual error only if a state-court merits decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "Or, to put it conversely, a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004).

Remediable Error Not Shown - Petitioner replies that the state court failed to resolve the portion of Ground 1 based on trickery, and argues (pointing to footnote 3) thate the state court improperly assumed the trickery did not amount to coercion that overbore his will, despite Supreme Court authority that trickery can amount to coercion. (Reply, Doc. 17 at 14.) Petitioner's reliance on the footnote is misplaced. The appellate court was not simply assuming the trickery was insufficient, but was assuming (in Petitioner's favor) that it should be attributed to the state.

Petitioner argues that the failure to consider the trickery was contrary to or an

unreasonable application of Supreme Court law. However, the state court did not fail to consider the trickery, but properly considered it as part of the "the totality of the circumstances surrounding the confession." (Exh. R, Mem. Dec. 2/9/17 at ¶ 9.) *See Dickerson v. United States*, 530 U.S. 428, 434 (2000) (voluntariness is determined by evaluating whether a defendant's will was overborne by considering the totality of all the surrounding circumstances).

The appellate court quoted the trial court's conclusion: "that the victim "engaged in trickery at the behest of the State apparently, but that does not amount to coercion." (Exh. R, Mem. Dec. 2/9/17 at ¶ 10.) If read as an assertion that trickery is irrelevant, this would be contrary to (or at least an unreasonable application of) *Dickerson*. But the plain import of this assertion is that trickery does not equate to ("does not amount to") coercion. Indeed, "trickery" is a relevant circumstance, but its existence does not necessarily establish the coercion required to render a confession involuntary. "Perhaps more importantly, even if Juan H. had confessed after police trickery, the interrogators did not use coercive means sufficient to render Juan H.'s statements involuntary." *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005), as amended, 2005 WL 1653617 (9th Cir. July 8, 2005). *See also Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (police misrepresentation that accomplice had confessed was relevant but insufficient under the totality of the circumstances to show confession was involuntary).

Finally, Petitioner argues that the trial court erred by not conducting an evidentiary hearing, citing *Lego v. Twomey*, 404 U.S. 477 (1972). But *Lego* did not find a right to an evidentiary hearing, only "a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Id.* at 489. Here, the trial court rendered a clear-cut determination, and Petitioner proffers nothing to explain why an evidentiary hearing was necessary for it to be "reliable." Indeed, Petitioner had not requested an evidentiary hearing, only an "oral argument." (Exh. E. Mot. Suppress at 1; Exh. H. Renewed Mot. Suppress at 1; Exh. I, M.E. 3/16/15 (denying "request for Oral Argument").) Moreover, Petitioner still fails to suggest what significant evidence could have been adduced at such

a hearing. The court had before it the recording (*see* Exh. YY, R.T. 10/18/13 at 61) and transcription of the confrontation call (Exh. D), arguably the best evidence of the relevant events. Even if this Court might be convinced that an evidentiary hearing was necessary, there is no basis to conclude that the state court's contrary conclusion was unreasonable given the evidence before it.

Ground 1 is without merit and must be denied.

C. GROUND 2 - EXCLUSIONARY RULE CLAIM

Petitioner's claim in Ground 2 asserts an exclusionary rule claim *i.e.* that his conviction was based on evidence obtained in violation of the Fourth Amendment.

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court recognized that habeas proceedings are so far removed from the offending conduct that any deterrent effect on police conduct is outweighed by the societal cost of ignoring reliable, trustworthy evidence and the judicial burden of litigating collateral issues. Thus, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494.

Petitioner argues that full and fair litigation requires "at least [a] full and fair evidentiary fact-finding hearing at the trial court level," and his request for an evidentiary hearing on his motion to suppress was denied. (Reply, Doc. 17 at 11-12 (citing Exh. I).) But *Stone* does not mandate an evidentiary hearing unless one is necessary to a full and fair hearing on the claim. Thus, for example, the Ninth Circuit has held that *Stone* was satisfied where the trial court rejected the claims without holding an evidentiary hearing because it concluded the defendant's version of the facts did not differ from the officers, or that the allegations were too conclusory. *Mack v. Cupp*, 564 F.2d 898, 901 (9th Cir. 1977).

Petitioner argues an evidentiary hearing was required to show that he had a reasonable expectation of privacy in the confrontation call. (Reply, Doc. 17 at 12.) While

a reasonable expectation of privacy is necessary to a Fourth Amendment claim, it is not sufficient. "Such a 'constitutionally protected reasonable expectation of privacy' exists only if (1) the defendant has an 'actual subjective expectation of privacy' in the place searched and (2) society is objectively prepared to recognize that expectation." *United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir. 1996).

Here, Petitioner had no *protected* expectation of privacy in the phone call. No matter how much a defendant expects a phone conversation to remain private (reasonably or otherwise), the Fourth Amendment does not prevent the participant on the other end from sharing with police the information divulged to them, either by repeating it or by allowing law enforcement to listen in and/or record it. *Lopez v. United States*, 373 U.S. 427, 438-439 (1963). An evidentiary hearing on Petitioner's expectations and their reasonableness was thus unnecessary to reject Petitioner's motion to suppress.

Next, Petitioner argues *Stone* does not apply because the Arizona Court of Appeals decided the claim wrongly (*Id.* at 12-13.) "The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

It is true that a full and fair opportunity to litigate may be denied where the state court applies the wrong standard to deciding the Fourth Amendment claim. *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000), *overruled on other grounds by Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir. 2003). Here, Petitioner complains the state court applied the wrong standard because it failed to ascertain whether the call was governmental action, the caller was a state agent, whether he had an expectation of privacy and whether it could be waived by the other party. While each of those factors may be relevant to finding a Fourth Amendment violation, an invasion of a reasonable, constitutionally protected expectation of privacy is an indispensable requirement to finding a violation. Thus the state court did not err in relying upon a line of Arizona cases which followed the Supreme Court's instruction that there is no *protected* privacy expectation when otherwise private conversations are recorded with the permission of a

participant. (Exh. R, Mem. Dec. 2/9/17 at ¶ 11.) *See State v. Allgood*, 171 Ariz. 522, 524, 831 P.2d 1290, 1292 (Ct. App. 1992) (citing *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. White*, 401 U.S. 745, 753 (1971)); *State v. Stanley*, 123 Ariz. 95, 102, 597 P.2d 998, 1005 (Ct. App. 1979) (citing *inter alia White*, 401 U.S. 745; *Hoffa v. United States*, 385 U.S. 293 (1966).)

Accordingly, Petitioner fails to show he was denied an opportunity for full and fair litigation of his exclusionary rule claim in Ground 2, and the claim is barred under *Stone*.

D. GROUND 3 – RIGHT TO COUNSEL

In Ground 3, Petitioner argues his Sixth Amendment right to counsel was violated during the confrontation call because his "freedom was hinged on his responses." (Petition, Doc. 1 at 8.) Respondents rely upon deferential review of the decision of the Ariz. Court of Appeals on this claim that the right of counsel had not yet attached. (Answer, Do. 15 at 28-29.)

The state court opined:

> ¶13 Deng also contends his Sixth Amendment rights were violated because as soon as he became "the accused," he "had a right to have counsel act as a buffer between [himself] and the State." However, and again assuming arguendo the victim was a state agent, Deng was not arrested or charged with a crime until after the phone call, meaning his Sixth Amendment right to counsel had not yet attached. *See State v. Fulminante*, 161 Ariz. 237, 246 (1988) ("The sixth amendment does not attach during pre-indictment questioning.")

(Exh. R., Mem. Dec. 2/9/17 at ¶ 13.)

Petitioner argues that the state courts decision merits relief because it focused on the attachment of the right to counsel. Petitioner argues that the right to counsel must turn on an evaluation of the need for counsel regardless whether adversarial proceedings have begun or the defendant has been taken into custody. (Reply, Doc. 17 at 18-21.)

Petitioner is mistaken.

> This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.

Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 194 (2008). Here, at the time of the confrontation call, Defendant had not appeared before a judicial officer, nor had a formal (*i.e.* judicial) accusation been made against him.

Petitioner argues the initiation of **judicial proceedings** is unnecessary citing *Escobedo v. State of Ill.*, 378 U.S. 478 (1964). But *Escobedo* (a precursor to *Miranda*) held only that the state could not deny a request to consult with counsel during a pre-judicial-proceedings custodial interrogation. 378 U.S. at 491. Here, Petitioner was not in custody during the confrontation call, and did not request to consult with counsel.

Petitioner argues a **need for counsel** is sufficient, citing *inter alia Moore v. Illinois*, 434 U.S. 220 (1977). *Moore*'s discussion of need drew on earlier decisions finding that the Sixth Amendment right to counsel was not limited to the actual trial, but included other proceedings where counsel was needed, *i.e.* "critical stages." (Under this standard, for example, a defendant awaiting trial does not have a Sixth Amendment right to counsel when his breakfast is delivered to his cell by a sheriff's deputy.) But the holding of *Moore* did not dispense with the judicial proceedings requirement, but simply defined it broadly as not limited to post-indictment but "'at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" 434 U.S. at 226 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

Petitioner argues that **custody** is not required citing *Massiah v. United States,* 377 U.S. 201 (1964). But *Massiah* applied only to post-judicial, non-custodial statements, *i.e.* "incriminating statements which government agents [with the assistance of a co-defendant] had deliberately elicited from him after he had been indicted [and released on bond] and in the absence of his retained counsel." 377 U.S. at 204.

Ground 3 is without merit and must be denied.

E. GROUND 4 – SELF-INCRIMINATION

In Ground 4, Petitioner argues that the admission of the confrontation call resulted

in him being compelled to incriminate himself in violation of the Fifth Amendment. (Petition, Doc. 1 at 9.) Respondents argue that state court's rejection of these claims was on the merits, is entitled to deference, and must be upheld. (Answer, Doc. 15 at 24-28.) Petitioner replies to clarify that he makes no *Miranda* or involuntariness claim in Ground 4, but instead argues only that the admission of his own statements without his consent is *ipso facto* compelled self-incrimination. He concedes this may be different from the claim presented on direct appeal, but asserts he is merely "reformulating his argument and providing additional facts to improve his legal theory. (Reply, Doc. 17 at 17-18.)

Petitioner did not present this "clarified" claim on direct appeal. On direct appeal, Petitioner essentially argued that although *Miranda* was primarily concerned with custodial interrogation, one of its goals was "to secure the privilege against self-incrimination" (Exh. O, Opening Brief at 24 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)), and that *Miranda* required that "incriminating statements must be voluntarily given to be admissible" (*id.* at 25).

Because this claim was never raised or addressed on the merits in the state courts,[9] this Court addresses it *de novo*, rather under the deference of 28 U.S.C. § 2254(d).

Even so, contrary to Petitioner's contention, his lack of consent to the admission of his recorded statements is not a violation of the right against self-incrimination. It is not the voluntariness of the *admission* of the statement which is required, only the voluntariness of the *making* of the statement. "A confession is voluntary in law if, and only if, it was, in fact, voluntarily *made*." *Ziang Sung Wan v. United States*, 266 U.S. 1, 14 (1924). "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by [the admission of] even the most damning admissions." *United States v. Washington*, 431 U.S. 181, 187 (1977). A contrary rule would effectively outlaw

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[9] Respondents have not argued the claim is procedurally defaulted. Because the claim is plainly without merit, and Petitioner has not had an opportunity to respond based on a procedural default defense the undersigned declines to raise procedural default *sua sponte*. *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998) (procedural default raised *sua sponte*); *Franklin v. Johnson*, 290 F.3d 1223 (9th Cir. 2002) (merits in lieu of procedural default).

the admission of any confession, no matter how voluntarily made, so long as the defendant objected to its admission.

Ground 4 is without merit and must be denied.

F. GROUNDS 8 & 9 –INEFFECTIVE ASSISTANCE

In Ground 8, Petitioner argues ineffective assistance of trial counsel.[10] In Ground 9, Petitioner argues ineffective assistance of appellate counsel. The individual claims of ineffectiveness which are not procedurally defaulted are addressed hereinafter.

1. Applicable Standard on Ineffective Assistance Claims

Generally, claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on such a claim, Petitioner must show: (1) deficient performance - counsel's representation fell below the objective standard for reasonableness; and (2) prejudice - there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88. Although the petitioner must prove both elements, a court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. *Id.* at 697.

2. Grounds 8(1)-(2) – Motion to Suppress/Voluntariness

In Ground 8(1), Petitioner argues trial counsel was ineffective for failing to request an evidentiary hearing on the motion to suppress the confrontation call to show the caller was a state agent and engaged in trickery. In Ground 8(2) Petitioner argues trial counsel was ineffective for failing to request a voluntariness hearing to have a "clear-cut determination that petitioner's confession was in fact voluntarily rendered." (Petition, Doc. 1 at 9-D.) Respondents rely on deferential review on the state court's rejection of

[10] Petitioner distinguishes between pre-trial Lopez and trial counsel Dean. Because the identity of the specific counsel has no bearing on the claims, the undersigned simply addresses them as "trial counsel."

the merits of these claims. (Answer, Doc. 15 at 31-33.)

This issue was raised in Petitioner's first PCR proceeding. The Arizona Court of Appeals (Exh. HH, Mem. Dec. 8/6/19) and the Arizona Supreme Court (Exh. KK, Order 6/3/20) issued summary rulings. Thus the trial court's decision was the last reasoned one, and it rejected any basis to find prejudice, given the admissibility of the confrontation call. (Exh. CC, M.E. 11/13/18 at 2.)

Petitioner replies that the PCR court could not reach its conclusion of no prejudice without conducting the referenced evidentiary hearing. He argues the evidentiary hearing would have revealed that: (1) the confrontation call was recorded by a wiretap, and was thus a wrongful seizure conducted through an agent of the state and though required a warrant; and (2) the nature of the trickery involved in the confrontation call, and that Petitioner's free will was overborne by the trickery and deception. He argues the evidentiary hearing was necessary to a reliable and clear-cut determination of his voluntariness. (Reply, Doc. 17 at 21-24.)

Petitioner's arguments regarding the means of the recording of the confrontation call (a wiretap) are without merit because: (a) the appellate court found no violation of the state wiretap statutes (Exh. R, Mem. Dec. 2/9/17 at ¶ 9), which state law decision is not reviewable in this habeas case, *Bains v. Cambra*, 204 F.3d 964, 971 (9th Cir. 2000); and (b) the federal wiretap statutes except such wiretaps, *see* 18 U.S.C. § 2511(2)(c) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.").

Moreover, a warrant is only required where there is a protected expectation of privacy. *California v. Greenwood*, 486 U.S. 35, 41 (1988). For the reasons discussed hereinabove with regard to Ground 2, Petitioner had no protected expectation of privacy in the confrontation call. That the means of recording was a wiretap, rather than a recording from the earpiece of the victim's phone is irrelevant. "Wire taps obtained with

the consent of one party to a conversation do not violate the fourth amendment, however." *United States v. Keen*, 508 F.2d 986, 989 (9th Cir. 1974).

For the reasons discussed hereinabove with regard to Ground 1, the arguments about the need for an evidentiary hearing to resolve the voluntariness issue are without merit.

Petitioner posits no other legal or factual error in the state court's decision, and the undersigned finds none. Grounds 8(1) and 8(2) are without merit.

3. Grounds 8(4) and 9(1)

In Ground 8(4) Petitioner argues that trial counsel was ineffective for failing to disclose photographs the medical expert intended to rely on to corroborate his testimony. (Petition, Doc. 1 at 9-E.) In Ground 9(1) Petitioner argues that appellate counsel was ineffective for failing to challenge suppression of the photos on direct appeal. (*Id.* at 9-F.) Respondents rely on deferential review on the state court's rejection of the merits of these claims. (Answer, Doc. 15 at 34-35.)

In responding to these claims in the PCR Court, the State described the surrounding facts:

> During the testimony of Defendant's expert, Dr. Theodore Hariton, it was revealed that the expert had brought three photos which had not previously been disclosed to the State which he intended to use as demonstrative exhibits. (R.T. 7/6/15 (PM Session) at 47.) The State objected to the use of the photos based on a lack of disclosure. (*Id.*) The photos showed the exterior genitalia of three girls who were not the victim. (*Id.* at 47-49.) Trial Counsel described the photos as "one of them is basically of a girl that has not used tampons and no sex, and then the other two are one age 16, active with consent, and then one that had multiple episodes." (Id. at 58.) This Court sustained the State's objection to the use of the photographs because the State didn't have the photos prior to the testimony and was unable to show them to the State's expert that had already testified. (*Id.* at 51.) No other limitations were placed on Defendant's expert.

(Exh. AA, PCR Resp. at 4-5. *See also* Exh. XX, R.T. 7/16/15 PM at 47-51.)

The PCR court opined:

> The Court further finds that the results of Defendant's trial, and appeal, would be unchanged even if the photographs had not been

> precluded and/or this issue had been raised on appeal. As set forth in the State's Response, the Defendant's expert was permitted to testify, and to draw his own pictures superimposed on already admitted photographs. And Defendant's conviction was supported by the victim's own detailed testimony and by the Defendant's own admissions. An alleged error with respect to the photos is a pretense and ruse. Defendant has not made a colorable claim that even assuming counsel was ineffective counsel's actions would have made any difference in outcome.
>
> * * *
>
> As set forth above, the photos now championed by Defendant as key evidence was inconsequential to the outcome. Nonetheless, the record discloses that trial counsel was able to submit essentially the same evidence simply without the photographic confirmation. Counsel for the Defendant at trial made an impassioned plea for admission of photographs. Despite the diligence of counsel in arguing for admission of the photographs the Court precluded their use as exhibits. Perhaps of greatest significance, as pointed out by the State there is absolutely no indication in the record regarding when defense counsel first learned of or was provided with these photos. Absent this information it would be entirely speculative to assume counsel was anything other than diligent.
>
> And the defense expert was allowed to testify regarding what the photographs showed, and the transcript reflects this testimony may very well have been more persuasive than it would have been without the photographs. The expert was allowed to comment on a photograph of the victim, which was the vital issue. Photographs for demonstrative purposes of other young girls were unnecessary. Trial counsel was far from ineffective with respect to testimony of the expert, of which the photographs were merely a part. Defendant has failed to overcome the "strong presumption" involving trial counsel's decisions. Defendant's claims that counsel was objectively deficient are not borne out by the record.
>
> * * *
>
> Here, it is clear that appellate counsel did not fall below the "prevailing professional standards." It was and is clear that the issue of the photographs would not have changed the outcome by any stretch of any imagination. Thus, omission of this issue was perfectly appropriate and involved simply the "intentional selection of the most promising issues." Defendant has not raised a colorable claim of ineffective assistance of counsel.

(Exh. CC, Order 11/13/19 at 2-4.)

Petitioner replies it is undisputed that the non-disclosure precluded the admission of the photos, establishing ineffectiveness. (Reply, Doc. 17 at 24.) But the prejudice required to find ineffective assistance is not satisfied by simply showing a change in the progress of the trial or evidence. It requires a reasonable probability that the *result* of would have been different, *e.g.* that Petitioner would have been found innocent. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the

judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

Petitioner replies that the evidence was supportive of the defense, and thus "could probably have raised a reasonable doubt," positing that the PCR Court "could not have known how the jury would have reacted." (Reply, Doc. 17 at 25.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. at 693. And despite Petitioner's discomfort with the PCR court being tasked with prognosticating the likely effect on a jury, that is the task imposed by *Strickland*. "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696.

Thus, the reviewing court is neither required to become a seer nor to simply speculate, but to make a probabilistic determination, *i.e.* whether there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Petitioner's reliance on *Brady v. Maryland*, 373 U.S. 83 (1963) (*see* Reply, Doc. 17 at 25) for the proposition that the PCR court could not prognosticate the impact on the jury is misplaced for three reasons: (a) *Brady* does not address an ineffective assistance claim, but a claim of non-disclosure by the prosecution; (b) Petitioner's reference is to a quotation from the decision of the Maryland court of appeals ("[w]e cannot put ourselves in the place of the jury and assume what their views would have been"), which was reversed in *Brady, id.* at 88; and (c) *Brady* itself imposed a requirement for a finding of "materiality," which effectively requires the reviewing court to find some effect on the outcome. *Benn v. Lambert*, 283 F.3d 1040, 1053, n. 9 (9th Cir. 2002) ("Evidence is not

'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.'").

Petitioner complains that the PCR court erred in concluding that the photographs were not necessary for demonstrative purposes because the court is not a medical expert. (Reply, Doc. 17 at 26.) But the PCR court was not making a medical determination, only a factual/legal finding on the potential impact on the jury.

He argues the PCR court's prejudice determination has to be wrong because a picture is worth a thousand words. (Reply, Doc. 17 at 26.) At best, this invites this court to supplant its own evaluation of the evidence. Even if this Court could agree with Petitioner, that does not render the state court's factual or legal determinations unreasonable. Accordingly, Petitioner fails to show he is entitled to relief under 28 U.S.C. § 2254(d).

Finally, Petitioner argues with regard to **Ground 9(1)** that appellate counsel could have relied upon Petitioner's arguments to make out a winning claim. For the reasons discussed hereinabove, that argument is without merit. Moreover, it does not address the state court's finding of no deficient performance based on appellate counsel's obligation to make tactical decisions about what claims to bring on appeal. Appellate counsel performs deficiently only if unpresented claims were "clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 285, 288 (2000).

Grounds 8(4) and 9(1) are without merit.

G. GROUND 10 – DUE PROCESS ON PCR REVIEW

In Ground 10, Petitioner argues he was deprived of due process when the Arizona Court of Appeals failed to conduct meaningful review in his PCR proceeding and gave no findings of fact in the Memorandum Decision issued August 6, 2019 (Exh. HH), in violation of Federal Rule of Civil Procedure 52(a) and Local Rule of Civil Procedure 3.7(c). (Petition, Doc. 1 at 9-I.) Respondents argue that this is a non-cognizable federal rules claim, and without merit. (Answer, Doc. 15 at 35-36.) Petitioner does not reply in support of this claim.

In light of the construction of this claim in the Service Order that this claim alleged a federal claim of a violation of due process, and the lack of merits to the claim, the undersigned finds no reason to address whether a non-cognizable claim is raised based on Petitioner's reference to violations of federal rules.

Indeed, the claim is without merit. Petitioner points to no applicable authority for the proposition due process requires a state appellate court affirming a denial of post-conviction relief to lay out factual findings, etc. Moreover, the reasons for the appellate court's decision were explained, *i.e.* that an abuse of discretion standard applied to their review and that they found no abuse of discretion in the PCR court's decision. (Exh. HH, Mem. Dec. 8/6/19 at ¶¶ 2-3.) The relevant facts, therefore, are the decision of the PCR court and the record on which that court relied. Petitioner fails to explain what more was needed for him to seek further review.

Petitioner complains that he was afforded no meaningful review. But, as argued by Respondents, the appellate court reported that it had "reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review." (*Id.* at ¶ 3.) Petitioner suggests nothing else which the appellate court could or should have reviewed. The terseness of the state court's opinion is not controlling. "While it is preferable for an appellate court in a criminal case to list all of the arguments that the court recognizes as having been properly presented, federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013) (citations omitted) (finding presumption that federal claim was rejected on its merits even though not mentioned in opinion).

Petitioner's reliance on Federal Rule of Civil Procedure 52(a) is misplaced for two reasons. First, those rules apply only to the "United States district courts," and only to "*civil* actions and proceedings." Fed. R. Civ. P. 1 (emphasis added). Second, that particular rule requires findings of fact and conclusions of law only in resolving a trial to the court or a motion for an interlocutory injunction. Fed. R. Civ. P. 52(a)(1)(2). Petitioner's reliance on Local Rule of Civil Procedure 3.7(a) is similarly misplaced. Those

rules are adopted by the U.S. District Court and govern only "its practice." Fed. R. Civ. P. 83(a)(1). Moreover, Rule 3.7(c) relates only to assignment of bankruptcy matters.

Even if the Court were to construe the Petition as referring to Arizona Rule of Civil Procedure 52(a), similar defects would apply. Those rules apply only to "*civil* actions and proceedings" and only in "the superior Court of Arizona," not the Arizona Court of Appeals. Ariz. R. Civ. P. 1. Similarly, the Superior Court Local Rules--Maricopa County governs only the Maricopa County Superior Court. Superior Court Local Rules--Maricopa County, Rule 11. And Rule 3.7(c) of those rules only relates to findings of fact and conclusions of law "required by Rule 52(a), Arizona Rules of Civil Procedure," which do not apply to Petitioner's PCR petition or in the Arizona Court of Appeals.

Ground 10 is without merit.

H. SUMMARY

Petitioner's claims in Grounds 5, 6, 8(3), 8(5)-(7), and 9(2)-(6) must be dismissed with prejudice as procedurally defaulted and/or procedurally barred, as discussed herein. His claim in Ground 2 must be dismissed with prejudice as barred by *Stone*. His remaining claims are without merit and thus they and the Petition must be denied.

IV. CERTIFICATE OF APPEALABILITY

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Assuming the recommendations herein are followed in the district court's judgment, that decision will be in part on procedural grounds, and in part on the merits. Under the reasoning set forth herein, jurists of reason would not find it debatable whether the district court was correct in its procedural ruling, and jurists of reason would not find the district court's assessment of the constitutional claims debatable or wrong.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED:

(A) Grounds 2, 5, 6, 8(3), 8(5)-(7), and 9(2)-(6) of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be **DISMISSED WITH PREJUDICE**.

(B) The balance of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be **DENIED**.

(C) To the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

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

However, pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328

F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

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

Dated: February 15, 2022

21-0546r RR 22 02 04 on HC.docx

James F. Metcalf
United States Magistrate Judge

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tony Deng,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV 21-0546-PHX-SPL

ORDER

The Court has before it, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), the Answer from the Respondents (Doc. 15), and the Petitioner's Reply to the Answer. (Doc. 17) Additionally, the Court is in receipt of the Report and Recommendation of the Magistrate Judge (Doc. 24), the Petitioner's Objections (Doc. 27), and Respondent's Reply to the Petitioner Objections. (Doc. 28)

A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b). When a party files a timely objection to an R&R, the district judge reviews *de novo* those portions of the R&R that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection requires specific written objections to the findings and recommendations in the R&R. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b) (1). It follows that the Court need not conduct any review of portions to which no specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is judicial

economy). Further, a party is not entitled as of right to *de novo* review of evidence or arguments which are raised for the first time in an objection to the R&R, and the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

The Court has carefully undertaken an extensive review of the sufficiently developed record. The Petitioner's objections to the findings and recommendations have also been thoroughly considered.

After conducting a *de novo* review of the issues and objections, the Court reaches the same conclusions reached by the magistrate judge. The R&R will be adopted in full. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation (Doc. 24) is **accepted** and **adopted** by the Court.

2. That the Petitioner's Objections (Doc. 27) are **overruled**.

3. That the Petition for Writ of Habeas Corpus (Doc. 1) is **denied** and this action is **dismissed with prejudice**.

4. That a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **denied** because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable; and

5. That the Clerk of Court shall enter judgment according and terminate this action.

Dated this 31st day of March 2022.

Honorable Steven P. Logan
United States District Judge

APPENDIX

E

FILED

OCT 27 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY DENG, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 22-15480 D.C. No. 2:21-cv-00546-SPL District of Arizona, Phoenix ORDER

Before: SCHROEDER and BYBEE, Circuit Judges.

Appellant's motion for an extension of time to file a motion for reconsideration (Docket Entry No. 4) is granted.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.