Exhibit A

Ninth Circuit Order

District Court Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 16 2023

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

CURTIS BENJAMIN HOLLINGSWORTH, AKA Curtis Hollingsworth,

Petitioner-Appellant,

v.

DAVID SHINN, Director; ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents-Appellees.

No. 22-16660

D.C. No. 3:21-cv-08168-DWL
District of Arizona,
Prescott

ORDER

Before: O'SCANNLAIN and BENNETT, 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.

Apperdix B

District Court order

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Curtis Benjamin Hollingsworth,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-08168-PCT-DWL

ORDER

On July 28, 2021, Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (the "Petition"). (Doc. 1.) On August 8, 2022, Magistrate Judge Willett issued a Report and Recommendation ("R&R") concluding the Petition should be denied and dismissed with prejudice. (Doc. 16.) Afterward, Petitioner filed objections to the R&R (Doc. 18) and Respondents filed a response (Doc. 19). For the following reasons, the Court overrules Petitioner's objections, adopts the R&R, and terminates this action.

I. Background

The Crime. In December 2011, Petitioner drove up to the victim (a seventeen-year-old girl taking an evening walk), grabbed her right wrist, and told her to "[g]et in my car." (Doc. 16 at 2.) Although Petitioner grabbed the victim hard enough to leave marks on her wrist, she broke free and ran into the front yard of a nearby house. (*Id.*) Petitioner drove slowly by the front of the house but sped away after the victim yelled at him. (*Id.*) The victim ran home, told her mother about the incident, and her mother called 911. (*Id.*) The victim gave the deputy sheriff a detailed description of Petitioner's car (a Buick), including

its license plate number, and described the shirt the driver was wearing as either "yellow or cream-colored" with "dark stripes going down vertically." (*Id.*)

The sheriff's office quickly traced the license plate to Petitioner and a deputy went to Petitioner's house. (*Id.*) The deputy saw a Buick that matched the description and the license plate number given by the victim parked in front of Petitioner's house. (*Id.*) He touched the car and the front grille area felt warm, which indicated that the car had been driven recently. (*Id.*) Petitioner answered the front door wearing a shirt that matched the description of the shirt given by the victim. (*Id.*) After getting a warrant, the deputies searched Petitioner's car and found a box of condoms in the glove compartment. (*Id.*)

Trial Court Proceedings. Petitioner was charged with felony kidnapping and misdemeanor assault. (*Id.* at 3.) A jury trial began on June 27, 2012, but the trial court declared a mistrial based on a tainted and unduly suggestive pretrial identification made by the victim. (*Id.* at 2-3.) Afterward, Petitioner moved to dismiss the case with prejudice, but the trial court denied the motion. (*Id.* at 3.)

A second trial commenced on September 12, 2012. (*Id.*) The kidnapping charge was tried to a jury and the assault charge was tried to the bench. (*Id.*) Petitioner was found guilty of both charges. (*Id.*) The trial court ultimately sentenced Petitioner to 22 years in prison. (*Id.*)

Direct Appeal. Petitioner timely appealed his conviction and sentence for kidnapping. (*Id.*) On March 3, 2016, the Arizona Court of Appeals affirmed. (*Id.*) The Arizona Supreme Court subsequently denied Petitioner's petition for review. (*Id.*)

PCR Proceedings. On January 23, 2017, Petitioner filed a notice of post-conviction relief ("PCR"). (*Id.*) Petitioner's PCR counsel later filed a PCR petition that presented an ineffective assistance of counsel claim premised on trial counsel's failure to object to improper vouching by the prosecutor. (*Id.*) After briefing, the trial court denied relief. (*Id.*) On February 23, 2021, the Arizona Court of Appeals affirmed. (*Id.*)

The Petition. As noted, Petitioner filed the Petition in July 2021. (Doc. 1.) The Court previously construed it as raising the following three grounds for relief: "In Ground

One, Petitioner alleges his Fifth, Sixth, and Fourteenth Amendment rights were violated by prosecutorial misconduct. In Ground Two, Petitioner claims the trial court violated his right to be free from double jeopardy when, after Petitioner's first trial was declared a mistrial, the trial court denied his motion to dismiss the charges. In Ground Three, Petitioner alleges he received ineffective assistance of counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments." (Doc. 4.) However, Judge Willett determined that it also raised a fourth ground of vindictive prosecution. (Doc. 16 at 29-32.)

The R&R. The R&R concludes the Petition should be denied and dismissed with prejudice. (Doc. 16.)

As for Ground Two (double jeopardy), the R&R concludes this claim is procedurally defaulted because, although Petitioner raised a double jeopardy claim during his direct appeal, Petitioner "did not reference federal law" with respect to that claim and "instead based his argument on *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984)." (*Id.* at 7-11.) The R&R concludes this approach did not constitute "fair presentation" of a federal claim, particularly because Arizona's state-law test for double jeopardy under *Pool* is broader than the federal test for double jeopardy. (*Id.*) The R&R also concludes that the references to federal law in Petitioner's petition for review to the Arizona Supreme Court were insufficient, both because they did not expressly denote that Petitioner was raising a federal double jeopardy claim and because they did not appear in Petitioner's brief to the Arizona Court of Appeals. (*Id.*) Additionally, the R&R concludes that, if Petitioner attempted to file a future PCR petition raising a federal double jeopardy claim, any such petition would be untimely and successive under state law. (*Id.*) Finally, the R&R concludes that Petitioner's procedural default of his double jeopardy claim is not excused because he has not shown cause for the default or actual innocence. (*Id.* at 11-12.)

Next, as for Ground One (prosecutorial misconduct), the R&R states that Petitioner appears to be raising eight distinct theories of misconduct—specifically, (1) commenting on the right to remain silent, (2) inflaming the jury, (3) eliciting backdoor hearsay, (4) improper bolstering, (5) misleading the jury about the lack of a lineup, (6) improper

couching of the defense closing argument, (7) vouching, and (8) use of an epithet (*i.e.*, calling Petitioner a "predator" during closing argument). (*Id.* at 15-26.) The R&R concludes that Petitioner fairly presented all eight of these theories as federal claims during his direct appeal. (*Id.* at 13-14) Nevertheless, on the merits, the R&R concludes that the state court's rejection of each theory was not premised on an unreasonable application of clearly established federal law or an unreasonable determination of the facts. (*Id.* at 15-26.)

Next, as for Ground Three (ineffective assistance—failure to object to prosecutor's vouching), the R&R concludes that Petitioner fairly presented this claim during his PCR proceeding but that the state court did not err by rejecting the claim on the merits, because the complained-of conduct did not constitute improper vouching and a failure to raise a meritless objection does not constitute ineffective assistance. (*Id.* at 26-29.)

Finally, as for Ground Four (vindictive prosecution), the R&R concludes that Petitioner fairly presented this claim during his direct appeal but that the state court's rejection of this claim was not premised on an unreasonable application of clearly established federal law or an unreasonable determination of the facts, because the prosecution's filing of a notice of aggravating circumstances after the mistrial did not have the effect of increasing Petitioner's maximum punishment—even if the notice hadn't been filed, Petitioner would have faced a statutory maximum of 35 years in prison, and the 22-year sentence he received was less than the maximum. (*Id.* at 29-32.)

II. Legal Standard

A party may file written objections to an R&R within fourteen days of being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254 Rules"). Those objections must be "specific." *See* Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations."). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended

disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *See* Fed. R. Civ. P. 72(b)(3).

District courts are not required to review any portion of an R&R to which no specific objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise."). Thus, district judges need not review an objection to an R&R that is general and non-specific. *See, e.g., Warling v. Ryan*, 2013 WL 5276367, *2 (D. Ariz. 2013) ("Because de novo review of an entire R & R would defeat the efficiencies intended by Congress, a general objection 'has the same effect as would a failure to object.'") (citations omitted); *Haley v. Stewart*, 2006 WL 1980649, *2 (D. Ariz. 2006) ("[G]eneral objections to an R & R are tantamount to no objection at all.").[1]

III. Analysis

Petitioner's objections to the R&R lack merit.

First, Petitioner appears to raise a claim of actual innocence. (Doc. 18 at 2.) This claim lacks merit because it is conclusory and undeveloped.

Second, Petitioner objects to the R&R's determination that Ground Two (double jeopardy) is procedurally defaulted. (*Id.* at 2-5.) Petitioner argues he should be deemed to have fairly presented a federal double jeopardy claim during his direct appeal because he cited federal cases during the proceedings in "the Arizona court." (*Id.* at 2.) This argument lacks merit because, as the R&R correctly observes (and as Respondents correctly note in their response, *see* Doc. 19 at 2-4), the citations to federal law either came too late (*i.e.*, they were raised for the first time in Petitioner's reply brief to the Arizona Court of Appeals

[1] *See generally* S. Gensler, 2 Federal Rules of Civil Procedure, Rules and Commentary, Rule 72, at 457 (2021) ("A party who wishes to object to a magistrate judge's ruling must make specific and direct objections. General objections that do not direct the district court to the issues in controversy are not sufficient. . . . [T]he objecting party must specifically identify each issue for which he seeks district court review . . . .").

or in Petitioner's petition for review to the Arizona Supreme Court) and/or were too fleeting and undeveloped to fairly denote that Petitioner was seeking relief on both federal and state-law grounds, particularly where (as here) the federal and state-law standards are different. At bottom, Petitioner's position is that he was not required to "present a separate argument for both a federal and state constitutional violation" (Doc. 18 at 2-3), but the law is to the contrary. *See, e.g., Anderson v. Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made.") (citation omitted); *Galvan v. Alaska Department of Corrections*, 397 F.3d 1198, 1204-05 (9th Cir. 2005) ("If a party wants a state court to decide whether she was deprived of a federal constitutional right, she has to say so. It has to be clear from the petition filed at each level in the state court system that the petitioner is claiming the violation of the federal constitution that the petitioner subsequently claims in the federal habeas petition. . . . To exhaust a federal constitutional claim in state court, a petitioner has to have, at the least, explicitly alerted the court that she was making a federal constitutional claim."). Alternatively, Petitioner objects to the procedural-default finding on the ground that, due to recent changes in Arizona law, he would be allowed to file another PCR petition raising a federal double jeopardy claim. (Doc. 18 at 4-5.) This objection fails for the reasons identified in Respondents' brief. (Doc. 19 at 4-7.)

Third, Petitioner objects to the R&R's recommendation that the Court deny habeas relief based on Ground One (prosecutorial misconduct). (Doc. 18 at 5-7.) Although the R&R individually analyzed all eight of Petitioner's theories of prosecutorial misconduct, Petitioner specifically mentions only one of those theories (commenting on the right to remain silent) in his objections. (*Id.*) Thus, Petitioner has forfeited any objection to the R&R's analysis of the other seven theories. To the extent Petitioner sought to obtain further review of all eight of his theories based on his request for the Court to exercise its "supervisory power . . . to vindicate a defendant's rights" and view his "prosecutorial misconduct claim [as] one claim" (Doc. 18 at 5-6), not only is a habeas proceeding an

inappropriate forum to request the exercise of such supervisory power, but Petitioner's failure to identify any specific flaws in the R&R's careful, well-reasoned analysis of the other seven theories operates as a forfeiture. *Thomas*, 474 U.S. at 149-50; *Reyna-Tapia*, 328 F.3d at 1121. Finally, as for the commenting-on-silence theory, the Court has independently reviewed the R&R's analysis and agrees with it. *Cook v. Schriro*, 538 F.3d 1000, 1020 (9th Cir. 2008) ("At most, the prosecutor's comment is a reference to Cook's statements to Holt while in jail together, not a direct comment on Cook's failure to testify. The Arizona Supreme Court's interpretation of this comment was not objectively unreasonable; therefore, there was no *Griffin* error."); *Rolan v. Coleman*, 680 F.3d 311, 326 (3d Cir. 2012) ("Neither the Fifth Amendment nor *Doyle* shield a defendant from a prosecutor's comments about statements [a defendant] made to the police. Therefore, the Superior Court's decision to deny Rolan's claim on this ground was not contrary to, or an unreasonable application of, Supreme Court precedent as stated in *Doyle*."); *Edwards v. Roper*, 688 F.3d 449, 460 (8th Cir. 2012) ("Edwards argues in substance that the prosecutor's argument was an indirect comment on Edwards's silence, and that it was calculated to induce the jury to draw an adverse inference from the failure to testify. This contention would not fare well even on direct appeal in a federal case . . . [b]ut this claim arises under AEDPA, and it fails for a more basic reason: the Supreme Court has never clearly established that a prosecutor may not comment on the evidence in a way that indirectly refers to the defendant's silence.").

Fourth, Petitioner objects to the R&R's recommendation that the Court deny habeas relief based on Ground Four. (Doc. 18 at 7-10.) According to Petitioner, the R&R misconstrued Ground Four as a vindictive prosecution claim, when in fact it is an "illegal sentence" claim. (*Id.*) Petitioner appears to argue that he is entitled to relief based on such a claim because his maximum sentence but-for the additional prior convictions alleged in the notice was 15.75 years, there was no jury finding as to those prior convictions, and thus the trial court was barred under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), from increasing his sentence based on them. (*Id.*) This objection fails for the reasons stated by

Respondents (Doc. 19 at 8-10)—to the extent Ground Four is *not* a vindictive prosecution claim, it is procedurally defaulted, and the use of prior convictions to enhance a sentence would not, in any event, violate *Apprendi*, which holds that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added).

Finally, to the extent Petitioner seeks to raise additional catch-all objections, objections based on access to the courts, or objections to the recommended denial of a certificate of appealability (Doc. 18 at 11-13), those objections are either forfeited based on a lack of specificity or fail on the merits for the reasons described above.

Accordingly, **IT IS ORDERED** that:

1. Petitioner's objections to the R&R (Doc. 18) are **overruled**.

2. The R&R (Doc. 16) is **accepted**.

3. The Petition (Doc. 1) is **denied and dismissed with prejudice**.

4. A Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **denied** because dismissal of Ground Two is justified by a plain procedural bar and Petitioner has not made a substantial showing of the denial of a constitutional right as to his remaining claims for relief.

5. The Clerk shall enter judgment accordingly and terminate this action.

Dated this 11th day of October, 2022.

Dominic W. Lanza
United States District Judge

Exhibit B

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Curtis Benjamin Hollingsworth,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-08168-PCT-DWL (ESW)

REPORT AND RECOMMENDATION

TO THE HONORABLE DOMINIC W. LANZA, UNITED STATES DISTRICT JUDGE:

Pending before the Court is Curtis Benjamin Hollingsworth's ("Petitioner") "Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus" (the "Petition") (Doc. 1). Respondents have filed their Answer (Doc. 7), and Petitioner has filed a Reply (Doc. 15). For the reasons explained herein, it is recommended that the Court (i) dismiss Ground Two as procedurally defaulted and (ii) deny Ground One, Three, and Four on the merits.

I. BACKGROUND

The Petition challenges Petitioner's Arizona state court convictions for kidnapping and assault.[1] As summarized by the Arizona Court of Appeals, the facts underlying Petitioner's convictions are as follows:

[1] The challenged judgment of conviction was entered in the Superior Court of Arizona in and for Yavapai County on October 23, 2012. (Doc. 1 at 1).

> ¶ 2 While driving his Buick in Cordes Lakes in December 2011, Hollingsworth followed the victim, a seventeen-year-old girl taking an evening walk. When the victim realized she was being followed, she ran and thought she was safe when she saw the Buick parked next to a store. But as she walked past a church parking lot, the Buick came towards her and, before she could run, Hollingsworth opened the driver's side door, grabbed her right wrist and told her to "[g]et in my car." Although he grabbed her hard enough to leave marks on her wrist, she broke free and ran into the front yard of a nearby house. Hollingsworth drove slowly by the front of the house, but sped away after the victim yelled at him.
>
> ¶ 3 The victim ran home, told her mother about the incident, and her mother called 9–1–1. The victim gave the deputy sheriff a detailed description of the Buick, including its license plate number. She also told the deputy that she saw the driver, and described the shirt he was wearing as either "yellow or cream-colored" with "dark stripes going down vertically," and told the deputy that the driver had a beer belly.
>
> ¶ 4 The sheriff's office quickly traced the license plate to Hollingsworth, and a deputy went to Hollingsworth's house. The deputy saw a Buick that matched the description and the license plate number given by the victim parked in front of Hollingsworth's house. He touched the car, and the front grille area felt warm, which indicated that the car had been driven recently. Hollingsworth answered the front door wearing a shirt that matched the description of the shirt given by the victim. After getting a warrant, the deputies searched Hollingsworth's car, and found a box of condoms in the glove compartment.

(Doc. 7-17 at 96).[2] A jury trial began on June 27, 2012. (Doc. 7-1 at 29). The trial court subsequently declared a mistrial based on tainted and unduly suggestive pretrial

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[2] Pursuant to 28 U.S.C. §§ 2254(d)(2), (e)(1), the Arizona Court of Appeals' summary of facts is presumed correct. As Petitioner has not presented clear and convincing evidence to the contrary, this Report and Recommendation adopts the factual summary set forth by the Arizona Court of Appeals. *See Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009) ("We rely on the state appellate court's decision for our summary of the facts of the crime."); *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir. 2012) ("[T]he statement of facts from the last reasoned state court decision is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence.").

identification made by the victim. (Doc. 7-7 at 27-32). Petitioner moved to dismiss the case with prejudice, which the trial court denied. (Doc. 7-9 at 60).

A second trial commenced on September 12, 2012. (Doc. 7-10 at 3). The kidnapping charge was tried before a jury. (Doc. 7-15 at 29). The misdemeanor assault charge was tried before the trial court. (*Id.*). On September 19, 2012, the jury found Petitioner guilty of kidnapping. (*Id.* at 33). The trial court found Petitioner guilty on the assault charge. (*Id.* at 30-31). After finding that Petitioner had two prior felony convictions, the trial court sentenced Petitioner to a total of twenty-two years in prison. (Doc. 7-16 at 10, 22).

Petitioner appealed his conviction and sentencing for kidnapping. (Doc. 7-16 at 27-79). On March 3, 2016, the Arizona Court of Appeals denied relief. (Doc. 7-17 at 105). The Arizona Supreme Court denied Petitioner's Petition for Review. (*Id.* at 133).

On January 23, 2017, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (*Id.* at 135-37). Petitioner's PCR counsel filed a PCR Petition that presented an ineffective assistance of counsel claim asserting that his trial counsel failed to object to improper vouching by the prosecutor. (*Id.* at 139-51). After briefing, the trial court denied relief. (*Id.* at 178-79). The Arizona Court of Appeals affirmed the trial court's ruling on February 23, 2021. (*Id.* at 190).

In July 2021, Petitioner timely initiated this federal habeas proceeding. (Doc. 1). The Court screened the Petition and required Respondents to file an answer. (Doc. 4). Respondents filed their Answer (Doc. 7) on September 9, 2021. Petitioner filed a Reply (Doc. 15) on April 27, 2022.[3]

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[3] On April 6, 2022, the Court issued an Order withdrawing the reference to the Magistrate Judge as to Petitioner's Motion (Doc. 11) requesting copies of any case law or other legal authority used in Respondents' Answer or Court orders. (Doc. 13). The Court denied Petitioner's Motion (Doc. 11). Petitioner's request for reconsideration (Doc. 14) of that Order is currently pending before the Court.

Motions for reconsideration should be granted only in rare circumstances. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multonomah County*, 5 F.3d at 1263; *see also* LRCiv 7.2(g)(1) ("The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that

In Section II of this Report and Recommendation, the undersigned finds that Ground Two is procedurally defaulted without excuse. Section III concludes that Grounds One, Three, and Four are meritless.

II. GROUND TWO IS PROCEDURALLY DEFAULTED

A. Legal Standards Regarding Procedurally Defaulted Habeas Claims

1. Exhaustion-of-State-Remedies Doctrine

It is well-settled that a "state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *see also Picard v. Connor*, 404 U.S. 270, 275 (1971) ("It has been settled since *Ex parte Royall*, 117 U.S. 241, 6 S. Ct. 734, 29 L.Ed. 868 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."). The rationale for the doctrine relates to the policy of federal-state comity. *Picard*, 404 U.S. at 275 (1971). The comity policy is designed to give a state the initial opportunity to review and correct alleged federal rights violations of its state prisoners. *Id.* In the U.S. Supreme Court's words, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950); *see also Reed v. Ross*, 468 U.S. 1, 11 (1984) ("[W]e have long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power.") (citations and internal quotation marks omitted).

The exhaustion doctrine is codified at 28 U.S.C. § 2254. That statute provides that

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could not have been brought to its attention earlier with reasonable diligence."). Such motions should not be used for the purpose of asking a court "to rethink what the court had already thought through – rightly or wrongly." *Defenders of Wildlife v. Browner*, 909 F.Supp 1342, 1351 (D. Ariz. 1995) (internal quotation marks and citation omitted).

Petitioner has not presented newly discovered evidence, cited any intervening change in controlling law, and has not shown that the Court committed clear error or issued a manifestly unjust decision. Accordingly, the undersigned recommends that the Court deny Petitioner's request for reconsideration (Doc. 14).

a habeas petition may not be granted unless the petitioner has (i) "exhausted" the available state court remedies; (ii) shown that there is an "absence of available State corrective process"; or (iii) shown that "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

Case law has clarified that in order to "exhaust" state court remedies, a petitioner's federal claims must have been "fully and fairly presented" in state court. *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To "fully and fairly present" a federal claim, a petitioner must present both (i) the operative facts and (ii) the federal legal theory on which his or her claim is based. This test turns on whether a petitioner "explicitly alerted" a state court that he or she was making a federal constitutional claim. *Galvan v. Alaska Department of Corrections*, 397 F.3d 1198, 1204–05 (9th Cir. 2005). "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citation omitted); *see also Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (federal basis of a claim must be "explicit either by citing federal law or the decisions of federal courts, even if the federal basis is self-evident or the underlying claim would be decided under state law on the same considerations that would control resolution of the claim on federal grounds").

2. Procedural Default Doctrine

If a claim was presented in state court, and the court expressly invoked a state procedural rule in denying relief, then the claim is procedurally defaulted in a federal habeas proceeding. *See, e.g., Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001). Even if a claim was not presented in state court, a claim may be procedurally defaulted in a federal habeas proceeding if the claim would now be barred in state court under the state's procedural rules. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

Similar to the rationale of the exhaustion doctrine, the procedural default doctrine is rooted in the general principle that federal courts will not disturb state court judgments based on adequate and independent state grounds. *Dretke v. Haley*, 541 U.S. 386, 392

(2004). A habeas petitioner who has failed to meet the state's procedural requirements for presenting his or her federal claims has deprived the state courts of an opportunity to address those claims in the first instance. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991).

As alluded to above, a procedural default determination requires a finding that the relevant state procedural rule is an adequate and independent rule. *See id.* at 729-30. An adequate and independent state rule is clear, consistently applied, and well-established at the time of a petitioner's purported default. *Greenway v. Schriro*, 653 F.3d 790, 797-98 (9th Cir. 2011); s*ee also Calderon v. U.S. Dist. Court (Hayes)*, 103 F.3d 72, 74-75 (9th Cir. 1996). An independent state rule cannot be interwoven with federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). The ultimate burden of proving the adequacy of a state procedural bar is on the state. *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003). If the state meets its burden, a petitioner may overcome a procedural default by proving one of two exceptions.

In the first exception, the petitioner must show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014). To demonstrate "cause," a petitioner must show that some objective factor external to the petitioner impeded his or her efforts to comply with the state's procedural rules. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004). To demonstrate "prejudice," the petitioner must show that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *see also Carrier*, 477 U.S. at 494 ("Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial.").

In the second exception, a petitioner must show that the failure to consider the federal claim will result in a fundamental miscarriage of justice. *Hurles*, 752 F.3d at 780. This exception is rare and only applied in extraordinary cases. *Wood v. Ryan*, 693 F.3d

1104, 1118 (9th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). The exception occurs where a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the offense that is the subject of the barred claim." *Wood*, 693 F.3d at 1117 (quoting *Schlup*, 513 U.S. at 327).

B. Petitioner Failed to Fairly Present Ground Two to the State Courts

In Ground Two of the Petition, Petitioner asserts "Double Jeopardy in violation of the Fifth, Sixth and Fourteenth Amendment[s]." (Doc. 1 at 7). Petitioner explains that his "first trial was declared a mistrial on the basis of prosecutorial misconduct. After the mistrial was declared, [Petitioner] filed a Motion to Dismiss case with prejudice for Double Jeopardy, prosecutorial misconduct, and due process violations." (*Id.*).

The Fifth Amendment Double Jeopardy Clause protects a criminal defendant from multiple prosecutions for the same offense. *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). Where a defendant moves for a mistrial, double jeopardy typically does not bar a retrial. *Id.* at 673. However, where the government's conduct gave rise to the motion and was "intended to 'goad' the defendant into moving for a mistrial," a defendant may raise the double jeopardy bar to prevent a retrial. *Id.* at 676.

In his direct appeal, Petitioner presented a double jeopardy claim. (Doc. 7-16 at 51-65). However, in presenting the claim, Petitioner did not reference federal law, and instead based his argument on *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984).

In *Pool*, the Arizona Supreme Court "broadened the *Oregon v. Kennedy* exception." *Miller v. Superior Ct.*, 938 P.2d 1128, 1131 (Ariz. App. 1997); *State v. Jorgenson*, 10 P.3d 1177, 1178 (2000) (explaining that "*Pool* rejects the rule adopted by the plurality opinion in *Oregon v. Kennedy*" as to the circumstances required for jeopardy to attach based upon a defendant's motion for mistrial stemming from prosecutorial misconduct). *Pool* holds that

> jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:
>
> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and

> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool, 677 P.2d at 271-72 (footnote omitted).

Some Arizona courts have observed that "[t]he double jeopardy protections extended by the Arizona Constitution are coextensive with those provided by its federal counterpart." *State v. Sprang*, 251 P.3d 389, 394 (Ariz. App. 2011) (quoting *Lemke v. Rayes*, 141 P.3d 407, 411 n. 2 (Ariz. App. 2006)). However, courts "cannot assume federal claims were impliedly brought by virtue of the fact that they may be 'essentially the same' as state law claims." *Casey v. Moore*, 386 F.3d 896, 914 (9th Cir. 2004).

In his Reply, Petitioner asserts that in his direct appeal, "[a]lthough he relied upon an Arizona case (*Pool v. Superior Court*) he also relied upon several U.S. Supreme Court rulings such as *Oregon v. Kennedy*, *Brady v. Maryland* and *United States v. Weatherspoon*." (Doc. 15 at 2). In support of this assertion, Petitioner provides citations to his Petition for Review filed in the Arizona Supreme Court. Petitioner recounts that on Page 9 of his Petition for Review, he states: "In *Pool v. Superior Court in and for Pima County*[] this Court broke from the United States Supreme Court's double jeopardy standard in *Oregon v. Kennedy* . . . ." (Doc. 15 at 2; Doc. 7-17 at 120).

Petitioner further recounts that Page 16 of his Petition for Review contains an excerpt from *Pool* that states that the trial judge's finding at issue in *Pool* "cannot be sustained even under the plurality view expressed [in] *Oregon v. Kennedy* . . . ." (Doc. 15 at 2; Doc. 7-17 at 127). In addition, Petitioner notes that Page 11 of his Petition for Review references the U.S. Supreme Court case *Brady v. Maryland*, 373 U.S. 83 (1963) when it is stated: "This case is a specific species of misconduct cases—the clandestine misconduct case.[] In cases where prosecutors present false evidence, threaten defense witnesses, or commit *Brady* violations there is typically one act which is the gravamen of

the misconduct." (Doc. 15 at 2; Doc. 7-17 at 122). Finally, Petitioner notes that the Petition for Review references the Ninth Circuit case *United States v. Weatherspoon* to support the argument that trial courts should consider the prosecutor's record of misconduct when evaluating the prosecutor's credibility. (Doc. 15 at 3; Doc. 7-17 at 122-23).

The above references to federal case law in Petitioner's Petition for Review do not constitute a fair presentation of Ground Two to the Arizona courts. While a petitioner is not required to recite "book and verse on the federal constitution," *Picard*, 404 U.S. at 277-78 (quoting *Daugherty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)), it is not enough that all the facts necessary to support the federal claim were before the state courts or that a "somewhat similar state law claim was made." *Anderson*, 459 U.S. at 6. "Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory." *Castillo v. McFadden*, 399 F.3d 993, 1003 (9th Cir. 2005); *see also Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988) ("[T]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.").

Further, it is noted that Petitioner's Opening Brief filed in the Arizona Court of Appeals does not cite federal authority in support of the double jeopardy claim. (Doc. 7-16 at 51-64). Ninth Circuit case law provides that a petitioner cannot exhaust a habeas claim by circumventing the applicable state court of appeals and going directly to the state supreme court. In *Casey v. Moore*, 386 F.3d 896, 915-18 (9th Cir. 2004), the Ninth Circuit held that a ground for habeas relief presented by a petitioner convicted by the State of Washington was unexhausted because the petitioner did not fairly present the claim to the Washington Court of Appeals. The Court rejected the petitioner's argument that the exhaustion requirement was satisfied because he raised it in his petition for

review in the Washington Supreme Court. After examining case law from other circuits and the U.S. Supreme Court, the Ninth Circuit concluded that because the petitioner "raised his federal constitutional claims for the first and only time to the state's highest court on discretionary review, he did not fairly present them." *Id.* at 918.

Therefore, under *Casey*, even if Petitioner did fairly present Ground Two as a federal claim in his Petition for Review filed in the Arizona Supreme Court, Petitioner failed to exhaust the claim as he did not fairly present it as a federal claim to the Arizona Court of Appeals. The undersigned finds that Respondents correctly assert (Doc. 7 at 7-9) that Ground Two is unexhausted. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court."); *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999) (holding that petitioner failed to "fairly present" federal claim to state courts where he failed to identify the federal legal basis for his claim); *Hiivala v. Wood*, 195 F.3d 1098 (9th Cir. 1999) (holding that petitioner failed to exhaust federal due process issue in state court because petitioner presented claim in state court only on state grounds).

If Petitioner returned to state court and presented Ground Two in a PCR Petition, the PCR Petition would be untimely and successive under adequate and independent state procedural rules. *See* Ariz. R. Crim. P. 32.2(a) and 32.4(b)(3). A state post-conviction action is futile where it is time-barred. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997). The undersigned finds that Ground Two is procedurally defaulted.[4] *See Beaty*, 303 F.3d at 987 (a claim is

[4] This type of procedural default is often referred to as "technical" exhaustion because although the claim was not actually exhausted in state court, Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him.").

procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the requirement would now find the claims procedurally barred") (quoting *Coleman*, 501 U.S. at 735 n.1).

C. Petitioner's Procedural Default is Not Excused

The merits of a habeas petitioner's procedurally defaulted claims are to be reviewed if the petitioner (i) shows cause for the default and actual prejudice as a result of the alleged violation of federal law or (ii) shows that the failure to consider the federal claim will result in a fundamental miscarriage of justice. *McKinney v. Ryan*, 730 F.3d 903, 913 (9th Cir. 2013).

Petitioner's status as a pro se litigant does not exempt Petitioner from the "cause and prejudice" standard. *Hughes v. Idaho State Board of Corrections,* 800 F.2d 905, 908 (9th Cir. 1986) (an illiterate *pro se* petitioner's lack of legal assistance did not amount to cause to excuse a procedural default); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988) (petitioner's arguments concerning his mental health and reliance upon jailhouse lawyers did not constitute cause). The undersigned finds that Petitioner has failed to establish that his procedural default is "due to an external objective factor that cannot fairly be attributed to him." *Smith*, 510 F.3d at 1146 (internal quotation marks and citation omitted). Petitioner has therefore failed to show cause for his procedural default. Where a petitioner fails to establish cause, the Court need not consider whether the petitioner has shown actual prejudice resulting from the alleged constitutional violations. *Smith v. Murray*, 477 U.S. 527, 533 (1986). Accordingly, the undersigned finds that Petitioner has not satisfied the "cause and prejudice" exception to excuse his procedural default.

To satisfy the fundamental miscarriage of justice exception, Petitioner must show that "a constitutional violation has resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 327. To the extent that Petitioner may assert that he is innocent, Petitioner does not proffer any new reliable evidence to support actual

innocence. *Schlup*, 513 U.S. at 324 ("To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."). The undersigned recommends that the Court find that Petitioner cannot pass through the actual innocence/*Schlup* gateway to excuse his procedural default. *See Smith v. Hall*, 466 F. App'x 608, 609 (9th Cir. 2012) (explaining that to pass through the *Schlup* gateway, a petitioner must first satisfy the "threshold requirement of coming forward with 'new reliable evidence'"); *Griffin v. Johnson*, 350 F.3d 956, 961 (9th Cir. 2003) ("To meet [the *Schlup* gateway standard], [petitioner] must first furnish 'new reliable evidence . . . that was not presented at trial.'") (quoting *Schlup*, 513 U.S. at 324). Consequently, the undersigned recommends that the Court dismiss Ground Two with prejudice.

III. MERITS REVIEW OF GROUNDS ONE, THREE, AND FOUR

A. Reviewing Habeas Claims on the Merits

In reviewing the merits of a habeas petitioner's claims, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires federal courts to defer to the last reasoned state court decision. *Woods v. Sinclair*, 764 F.3d 1109, 1120 (9th Cir. 2014); *Henry v. Ryan*, 720 F.3d 1073, 1078 (9th Cir. 2013). To be entitled to relief, a state prisoner must show that the state court's adjudication of his or her claims either:

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

28 U.S.C. § 2254(d)(1), (2); *see also, e.g., Woods*, 764 F.3d at 1120; *Parker v. Matthews*, 132 S. Ct. 2148, 2151 (2010); *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

As to the first entitlement to habeas relief as set forth in 28 U.S.C. § 2254(d)(1) above, "clearly established federal law" refers to the holdings of the U.S. Supreme Court's decisions applicable at the time of the relevant state court decision. *Carey v.*

Musladin, 549 U.S. 70, 74 (2006); *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). A state court decision is "contrary to" such clearly established federal law if the state court (i) "applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or (ii) "confronts a set of facts that are materially indistinguishable from a decision of the [U.S. Supreme Court] and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

As to the second entitlement to habeas relief as set forth in 28 U.S.C. § 2254(d)(2) above, factual determinations by state courts are presumed correct unless the petitioner can show by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *see also Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of the state court's decision. *Richter*, 562 U.S. at 101; *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

B. Ground One: Alleged Prosecutorial Misconduct

Ground One of the Petition alleges prosecutorial misconduct in violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights. (Doc. 1 at 6). In support of Ground One, Petitioner asserts that the prosecutor made improper comments during the prosecutor's closing argument. Petitioner asserts:

> At the second trial in the State's closing argument, the prosecutor repeatedly expressed his apparent personal support for the alleged victim's testimony and his distaste for the defendant. Over and over again the prosecutor placed the prestige of the government behind the State witness and against the defendant. In closing argument the prosecutor implied that [Petitioner] was a liar and he was not going to tell the truth. However, [Petitioner] did not testify at trial thereby, the prosecutor undermined [Petitioner's] constitutional right to remain silent.

(*Id.*).[5]

Respondents do not assert any affirmative defenses with respect to Ground One. (Doc. 7 at 11-12). Petitioner's Opening Brief filed in the Arizona Court of Appeals on direct appeal contains eight prosecutorial misconduct claims, all of which were denied. (Doc. 7-16 at 65-74; Doc. 7-17 at 102-05). It is not clear from Petitioner's presentation of Ground One whether he is seeking habeas review on all of those claims. If Ground One presents prosecutorial misconduct claims other than those presented on direct appeal, the claims are unexhausted and procedurally defaulted. "Even the same claim, if raised on different grounds, is not exhausted for the purpose of federal habeas review." *Rayner v. Mills*, 685 F.3d 631, 643 (6th Cir. 2012); *see also Blaylock v. Rewerts*, No. 2:18-CV-12656, 2019 WL 2247732, at *4 (E.D. Mich. May 24, 2019) ("Because Petitioner did not present the identical factual basis of his claim that the prosecutor committed misconduct in her closing argument as part of his prosecutorial misconduct claim on his direct appeal, he did not fairly present his claim that the prosecutor committed misconduct in her closing argument on his appeal of right."). The undersigned finds that the prosecutorial misconduct claims raised on direct appeal were fairly presented as federal claims to the Arizona Court of Appeals.[6] To the extent Ground One may be construed as presenting those same prosecutorial misconduct claims in this proceeding, the claims are without merit for the reasons discussed below.

1. Legal Standards

The clearly established federal law applicable to a claim of prosecutorial

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[5] In the Supporting Facts section of Ground One, Petitioner also recounts that Petitioner's first trial was declared a mistrial on the basis of prosecutorial misconduct. (Doc. 1 at 6). To the extent Ground One presents a separate prosecutorial misconduct based on the prosecutor's conduct in Petitioner's first trial, Petitioner did not present the claim on direct appeal. Therefore, Respondents correctly assert that the claim is unexhausted and procedurally defaulted. (Doc. 7 at 12 n.1).

The Supporting Facts section of Ground One also asserts "vindictive prosecution after the first trial the prosecutor put in a notice of aggravators however, he never presented the aggravators to the jury, nevertheless the court found the aggravators to be true and sentenced [Petitioner] to 6.25 years above the presumptive." (Doc. 1 at 6).

[6] In presenting the claims to the Arizona Court of Appeals, Petitioner explicitly relied on the Due Process Clause of the United States Constitution. (Doc. 7-16 at 65).

misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Thus, to prevail on a prosecutorial misconduct claim, a petitioner must show that not only were the prosecutor's actions improper, but that the actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

2. Analysis

i. Alleged Improper Comment on Right to Remain Silent

Petitioner did not testify at trial. On appeal, Petitioner asserted that the prosecutor improperly commented on Petitioner's right to remain silent during the prosecutor's opening statement. The Arizona Court of Appeals' decision provides the following summary of the prosecutor's opening statement:

> ¶ 44 During the opening statement the prosecutor, previewing what the jurors would hear about Hollingsworth's interview with the sheriff deputy, said:
>
> > [Hollingsworth] indicated that the vehicle, the '94 Buick, was his vehicle; that's the vehicle he had been driving in Cordes Lakes. And importantly, when asked when he simply drove by this girl who was walking in the road and she said, "Hey, get out of here," it was the defendant's recollection that his windows were rolled up and he [said h]e could hear her through this rolled-up glass. That's the only contact the defendant indicated, or *would admit to*, to the deputies.
>
> (Emphasis added.)

(Doc. 7-17 at 103) (alteration in original). Petitioner argued on appeal that the prosecutor improperly commented on Petitioner's right to remain silent when the prosecutor told the jury: "That's the only contact [with the victim] the defendant indicated, or would admit to, to the deputies." (Doc. 7-16 at 66). Petitioner asserted in his Opening Brief that the only way Petitioner "could rebut this statement was to testify. It tells the jury that there is

other information that [Petitioner] could have given to law enforcement, but did not. It asks the jury to draw a negative inference from silence." (*Id.*). In rejecting the claim, the Arizona Court of Appeals stated:

> ¶ 43 Hollingsworth first asserts that the prosecutor's misconduct during his opening statement warrants reversal because the State commented on his right to remain silent. We disagree.
>
> . . . .
>
> ¶ 45 The challenged statement—"[t]hat's the only contact the defendant indicated, or would admit to, to the deputies"—was the only reference in the State's opening statement about what the State hoped or intended to present to the jury. In part, it was factual, and the State went on to prove that Hollingsworth voluntarily made the pretrial statement that he was driving, saw the girl walking in the road, and told her to get out of here. Although there was no basis for the part of the statement that "or [he] would admit to," it was not about Hollingsworth's future decision about testifying at trial, nor about his invocation of his constitutional rights, nor does it imply that the jury could find Hollingsworth guilty because he would not admit to further facts to the deputies. Even though part of the statement was an inappropriate comment on the fact that Hollingsworth did not confess, it was tempered by the fact that the jury was instructed just before opening statements that "[s]tatements or arguments made by the lawyers in th[is] case are not evidence." The same instruction was included in the final instructions given to the jury, and we presume, in the absence of evidence to the contrary, that juries follow their instructions. *See State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).
>
> ¶ 46 Moreover, Hollingsworth cites to cases where a prosecutor made the statement during closing argument, which reflected that the defendant did not testify; a clear violation of law. *See* A.R.S. § 13–117(B); *State v. Shing*, 109 Ariz. 361, 364, 509 P.2d 698, 701 (1973). That standard does not apply here because the statement was made in the opening statement and subject to future proof, and we will not assume that the jury interpreted the prosecutor's statement in a manner most damaging to the defense. *See Houston v. Roe*, 177 F.3d 901, 909 (9th Cir. 1999) (recognizing that a reviewing "'court should not lightly infer that a prosecutor

> intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'") (quoting *Donnelly*, 416 U.S. at 647). Additionally, the court in both its preliminary instructions and final instructions not only instructed the jury that the State was required to prove each element of each offense beyond a reasonable doubt, but also told the jury that a defendant has a constitutional right not to testify at trial and the exercise of that right cannot be considered by the jury in determining whether a defendant is guilty or not guilty. As a result, we do not find that the prosecutor's statement during the opening statement is prosecutorial misconduct, nor do we find fundamental or any resulting prejudice. *See State v. Anderson*, 210 Ariz. 327, 341–42, ¶¶ 50–52, 111 P.3d 369, 383–84 (2005) (finding no error in prosecutor's statement because the court had admonished the jury that the lawyers' statements were not evidence).

(Doc. 7-17 at 103).

In *Griffin v. California*, 380 U.S. 609, 615 (1965), the Supreme Court held that: "the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids [ ] comment by the prosecution on the accused's silence. . . ." In *Doyle v. Ohio*, 426 U.S. 610, 620 (1976), the Supreme Court held that a prosecutor's "use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment."

Although the Arizona Court of Appeals' decision does not discuss *Griffin* or *Doyle* when rejecting Petitioner's first prosecutorial misconduct claim, AEDPA deference "does not require citation of [Supreme Court] cases-indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2003) (emphasis in original).

In their Answer, Respondents correctly observe that the prosecutor did not directly comment on Petitioner's right to remain silent when the prosecutor contrasted the victim's sworn testimony to Petitioner's statements to law enforcement. (Doc. 7 at 19).

Further, the trial court instructed the jury that it must not let Petitioner's decision on whether or not to testify affect the jury's deliberations. (Doc. 7-14 at 12-13). The trial court also instructed the jury that what the attorneys state during the opening statements and closing arguments is not evidence. (*Id.* at 13). "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Petitioner has not rebutted that presumption.

The undersigned finds that the Arizona Court of Appeals reasonably rejected Petitioner's first prosecutorial misconduct claim presented on appeal. *See Rolan v. Coleman*, 680 F.3d 311, 326 (3d Cir. 2012) (concluding that "[n]either the Fifth Amendment nor *Doyle* shield a defendant from a prosecutor's comments about statements [a defendant] made to the police"); *Cook v. Schriro*, 538 F.3d 1000, 1020 (9th Cir. 2008) (holding there was no *Griffin* error where the challenged comment made by prosecutor was "not a direct comment on [the defendant's] failure to testify"); *Edwards v. Roper*, 688 F.3d 449, 460 (8th Cir. 2012) (holding that where there "was not a direct comment on [the defendant's] failure to testify," the petitioner's claim failed under AEDPA for the "reason [that] the Supreme Court has never clearly established that a prosecutor may not comment on the evidence in a way that indirectly refers to the defendant's silence").

ii. Inflaming the Jury

During trial, the prosecutor called the victim's mother as a witness. The prosecutor asked the victim's mother on direct examination: "How has this incident affected [the victim] since it occurred?" (Doc. 7-11 at 116). The trial court overruled the defense's objection, and the mother answered: "She's more cautious; she doesn't go walking by herself anymore." (*Id.*). In his direct appeal, Petitioner asserted that it was improper for the prosecutor to elicit this testimony from the victim's mother. (Doc. 7-16 at 68). The Arizona Court of Appeals found no misconduct, observing that:

> After cross-examination of the victim, which implied the victim was fabricating her testimony, the victim's mother testified that the victim is more cautious and does not go

> walking by herself anymore. The testimony was proper because it substantiated the victim's testimony and was designed to undermine the inference that she was fabricating her testimony. *See State v. Thomas*, 130 Ariz. 432, 434, 636 P.2d 1214, 1216 (1981) (observing that "any evidence which substantiates the credibility of a prosecuting witness on the question of guilt is relevant and material") (citation omitted). Accordingly, we find no misconduct by the prosecutor's questions to the victim or her mother, which was a response to undermine the inference that the victim fabricated her testimony.

(Doc. 7-17 at 104).

To the extent Ground One of the Petition raises the above claim, Petitioner has not satisfied his burden under AEDPA by showing that the Arizona Court of Appeals' decision was premised on either an unreasonable application of clearly established federal law or an unreasonable determination of the facts. The undersigned finds that the Arizona Court of Appeals' rejection of the claim was reasonable.

iii. Backdoor Hearsay

In his third prosecutorial misconduct claim presented on appeal, Petitioner recounted that during trial, the prosecutor asked four separate officers to describe the nature of the dispatch call they received. (Doc. 7-16 at 69). Petitioner contended that the "evidence that came from this was that the incident was a kidnapping where a man tried to force a girl, who was out for a walk in that are[a], into a vehicle matching the description of [Petitioner's] vehicle. This was a clear attempt at improperly back-dooring hearsay." (*Id.*). In addressing this claim, the Arizona Court of Appeals stated:

> ¶ 48 Hollingsworth also maintains that the prosecutor "back-doored" hearsay testimony by asking each responding deputy what was the nature of the call. The record shows that the prosecutor was eliciting the testimony to set the foundation for the deputies' testimony, and the testimony was not hearsay because it was not admitted to prove the truth of the matter asserted. *See State v. Tucker*, 215 Ariz. 298, 315, ¶ 61, 160 P.3d 177, 194 (2007) (noting "testimony that is not admitted to prove its truth is not hearsay"). Thus, the prosecutor's questions did not amount to misconduct.

(Doc. 7-17 at 104). To the extent Ground One may be construed as presenting the above claim, the undersigned does not find that the Arizona Court of Appeals' rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

iv. Improper Bolstering

In the fourth prosecutorial misconduct claim presented to the Arizona Court of Appeals, Petitioner asserted that the prosecutor improperly asked the victim (i) "whether she was mad at her mother, was seeking attention, or had any reason to lie"; (ii) "to opine whether certain facts brought out by the defense meant she was lying"; and (iii) "why she would *continue* to lie if she had lied to begin with." (Doc. 7-16 at 69-70) (emphasis in original). Petitioner asserted that "[t]his was improper bolstering as well as improper opinion evidence." (*Id.* at 70). That claim was also rejected by the Arizona Court of Appeals, which stated:

> ¶ 49 Next, Hollingsworth asserts that the prosecutor engaged in bolstering by asking the victim if she was "mad at her mother, was seeking attention, or had any reason to lie." The question and resulting testimony was not about bolstering, but concerned the victim's lack of a motive to testify falsely. The question, as a result, is not improper bolstering but an attempt to mitigate the anticipated cross-examination, which would explore the victim's motivation to falsify the occurrence. *See State v. Vazquez*, 830 A.2d 261, 271 n. 10 (Conn. App. 2003) (stating that because a witness's motivation to lie may be explored on cross-examination, it may also be discussed during direct examination).
>
> ¶ 50 Hollingsworth also asserts that the prosecutor had the victim characterize the evidence by asking her on redirect examination if certain facts brought out during cross-examination "meant she was lying," and if she had been lying, why would she "continue to lie." The record shows that the prosecutor's questions during redirect were a response to Hollingsworth's impeachment during cross-examination. *See, e.g., Jones v. State*, 733 S.E.2d 400, 405 (Ga. App. 2012) (concluding that prosecutor could ask the victim "if she was telling the truth" on redirect after "defense counsel attempted to impeach the victim's credibility"). As a result, the

question was not impermissible, and we find no misconduct.

(Doc. 7-17 at 104).

The undersigned does not find that the Arizona Court of Appeals' conclusion above was contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

v. Misleading the Jury about the Lack of a Lineup

Petitioner argued on appeal that the prosecutor had a testifying detective

> tell the second jury that the reason law enforcement did not conduct a photo lineup was because of the *strength* of the identification evidence—[Petitioner's] admission to being in the area and seeing the victim, the so-called detailed description of the vehicle, the license plate, the so-called detailed description of the shirt, and the so-called detailed description of the suspect. This created the clear impression that a lineup was not necessary. Then he added to this that, if anything, the only paltry weakness in the identification was that the victim did not see the suspect's face "clear enough." The truth of the matter was that she had not seen the suspect's face *at all*. Then, if that was not bad enough, he added that the "not clear enough view" of the face was only going to prevent her from identifying the suspect *in a photo*, as opposed to *at all*. This was a misleading presentation of evidence on a crucial issue, on which there had already been substantial pretrial litigation and pretrial rulings, and all of which surrounded his own prior misconduct. How was the defense to respond to this tactic? Could the defense have pointed out the [the prosecutor's] prior manufacturing of an identification was proof that the identification evidence was *weak*, not strong? This created a false impression on the jury, that [the prosecutor] knew was misleading, with no reasonable way to correct it.

(Doc. 7-16 at 71-72) (emphasis in original). The Arizona Court of Appeals denied relief on the above claim, explaining:

> ¶ 51 Finally, Hollingsworth asserts that the prosecutor misled the jurors about the lack of a photo line-up. Hollingsworth complains that the prosecutor asked the detective why a lineup was not conducted, and the detective said, "[The victim] did say she did not see his face clear enough that she would be able to identify him in any photo." The question and

> answer were designed to explain why the police did not conduct a photographic line-up to have the victim identify her assailant. As a result, the prosecutor did not mislead the jury about the lack of a photo line-up. Consequently, we do not find any fundamental error or any resulting prejudice.

(Doc. 7-17 at 104). To the extent Ground One of the Petition presents the above claim, the undersigned finds that the Arizona Court of Appeals reasonably rejected the claim.

vi. Improper Couching of the Defense Closing Argument

In the sixth prosecutorial misconduct claim presented on direct appeal, Petitioner asserted that the prosecutor

> specifically told the jury in closing that "you can't" argue both that it did not happen at all *and* that it was not the [Petitioner] if it did. . . . A defendant has a due process right to a complete defense. The defense's argument was not logically inconsistent. If [Petitioner] was not there, he would have no way of knowing whether a real grabbing had occurred or not. Does that mean that a defendant in his position may not look at inconsistencies in the victim's story and question whether it happened at all? Of course not. . . . [The prosecutor's] argument basically says a defendant may not have two defenses and if he raised one, he must forego the other. He went farther and told the jury that the attempt to raise two defenses invalidated *both*. This had the effect of invalidating [Petitioner's] entire defense.

(Doc. 7-16 at 72-73). The Arizona Court of Appeals found no error:

> ¶ 56 Next, Hollingsworth argues that the prosecutor improperly commented on the defense's closing argument. The record demonstrates that the prosecutor commented on the defense's closing, but the prosecutor was criticizing Hollingsworth's theory that the offense did not happen or, if it did, he did not commit the offense. The prosecutor, as a result, did not improperly comment on Hollingsworth's closing argument. *See United States v. Sayetsitty*, 107 L.3d 1405, 1409 (9th Cir. 1997) ("Criticism of defense theories and tactics is a proper subject of closing argument."); *see also State v. Amaya–Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990) (concluding that prosecutor did not engage in misconduct when he characterized the defendant's defense as a "smoke screen" and called the defense counsel's argument "outrageous").

(Doc. 7-17 at 105).

In fashioning closing arguments, prosecutors are allowed reasonably wide latitude. *See United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002) ("During closing argument, . . . [p]rosecutors have considerable leeway to strike 'hard blows' based on the evidence and all reasonable inferences from the evidence.") (citation and internal quotation marks omitted). Although prosecutors may "strike hard blows" in closing argument, they may not "strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960). A prosecutor's comments cannot form the basis for habeas relief unless the petitioner establishes that they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974)).

The undersigned does not find that the prosecutor's comments concerning Petitioner's defense theory infected the trial with such "unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181. Further, to reiterate, the trial court instructed the jury that the attorneys' opening statements and closing arguments were not evidence. (Doc. 7-14 at 13). Petitioner has not shown that the Arizona Court of Appeals' ruling above was contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

vii. Vouching

On appeal, Petitioner argued that the prosecutor engaged in improper vouching when stating in the prosecutor's closing argument that

> "*I believe* the evidence shows that this is a kidnapping . . . ." This was the final sentence [the prosecutor] spoke to the jury. On direct examination of the victim, [the prosecutor] asked, "Did you give that clear, detailed description to law enforcement?" regarding the description of the vehicle. . . . The words "clear, detailed" were superfluous and constituted vouching on [the prosecutor's] part about central evidence.

(Doc. 7-16 at 73) (emphasis in original). In addressing the claim, the Arizona Court of Appeals correctly explained that "[v]ouching occurs when a prosecutor places the prestige of the government behind a witness or when the prosecutor suggests that information not presented to the jury supports a witness's testimony." (Doc. 7-17 at 105) (citing *State v. Rosas-Hernandez*, 42 P.3d 1177, 1184 (Ariz. App. 2002); *see United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). The Arizona Court of Appeals found that the claim is meritless:

> ¶ 57 Hollingsworth also asserts that the prosecutor engaged in vouching when he said, "I believe the evidence shows that this [was] a kidnapping." . . . . Here, the prosecutor was summing up his argument and was asking the jury to find Hollingsworth guilty. When read in context, the prosecutor's statement is not vouching as it has been defined in Arizona. *See id.*; *State v. Lee*, 185 Ariz. 549, 554, 917 P.2d 692, 697 (1996) (holding that when read in context the prosecutor's comments, "[n]ow she's been, I think, honest when she says she wasn't even aware that [other witnesses] had seen her" and "I think [another witness] was an honest man, certainly an honest man, but I think he made an honest mistake" were not vouching).

(Doc. 7-17 at 105).

Here, the prosecutor did not comment on the truthfulness of any witness's testimony or give personal assurances of any witness's credibility. *Cf. United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (finding improper vouching when prosecutor "clearly urged that the existence of legal and professional repercussions served to ensure the credibility of the officers' testimony"). Petitioner has failed to show that the Arizona Court of Appeals' rejection of the above claim was unreasonable. *See Joseph v. Coyle*, 469 F.3d 441, 474 (6th Cir. 2006) (prosecutor's repeated use of "I believe" and "I think" did not constitute vouching where "it does not appear that the prosecution was acting intentionally in an attempt to influence the jury" on an improper basis); *see also United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005) (stating that the prosecutor's use of the phrase, "we know," was not improper when it was used "to marshal evidence actually admitted at trial and reasonable inferences from that

evidence, not to vouch for witness veracity or suggest that evidence not produced would support a witness").

viii. Use of Epithet

At the end of the State's rebuttal closing argument, the prosecutor stated: "I believe the evidence shows that this is a Kidnapping, and I'm asking that you hold this predator responsible and find him guilty of Kidnapping." (Doc. 7-15 at 26). Petitioner asserted on appeal that the prosecutor's referral to Petitioner as a "predator" constituted misconduct. (Doc. 7-16 at 74). In rejecting the claim, the Arizona Court of Appeals stated:

> ¶ 58 Finally, Hollingsworth argues that the prosecutor committed misconduct by calling him a "predator." The use of the term was a single isolated statement the prosecutor made after discussing the evidence that supported the assertion that Hollingsworth followed the victim and planned to sexually assault her. Although the use of the term "predator" was excessive and emotional language, *see Jones*, 197 Ariz. at 305, ¶ ¶ 36–37, 4 P.3d at 360 (noting that "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal") (internal citations and quotation marks omitted), the isolated use of the term was not misconduct warranting reversal of the conviction. Consequently, no prejudicial fundamental error was committed during the closing arguments that so permeated the trial that it requires us to reverse the conviction.

(Doc. 7-17 at 105).

The undersigned does not find that the prosecutor's reference to Petitioner as a "predator" during the prosecutor's rebuttal closing argument infected the trial with such "unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (explaining that it "is not enough that the prosecutor['s] remarks were undesirable or even universally condemned") (internal quotation marks and citation omitted). The undersigned does not find that the Arizona Court of Appeals' rejection of Petitioner's final prosecutorial misconduct claim presented on appeal was contrary to, or an unreasonable application of, clearly established federal law, or based on an

unreasonable determination of the facts.

3. Conclusion

In summary, to the extent that Ground One of the Petition asserts any or all of the eight prosecutorial misconduct claims presented to the Arizona Court of Appeals on direct appeal, the undersigned finds that federal habeas relief is not warranted. The Arizona Court of Appeals' rejection of the prosecutorial misconduct claims was not "so lacking in justification" that it resulted in "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786-87. "[W]hile a defendant is entitled to a fair trial; he is not entitled to a perfect trial, for there are no perfect trials." *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (internal quotation marks and citation omitted). Petitioner has failed to show that the Arizona Court of Appeals' rejection of his prosecutorial misconduct claims was contrary to, or an objectively unreasonable application of, any clearly established federal law as determined by the United States Supreme Court. The undersigned recommends that the Court deny Ground One.

B. Ground Three: Alleged Ineffective Assistance of Counsel

1. Analyzing the Merits of Habeas Claims Alleging the Ineffective Assistance of Counsel

In Ground Three, Petitioner asserts that his trial attorney was constitutionally ineffective for "fail[ing] to object to the prosecutor's repeated improper vouching." (Doc. 1 at 8).

The "clearly established federal law" for an ineffective assistance of counsel claim is the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner arguing an ineffective assistance of counsel claim must establish that his or her counsel's performance was (i) objectively deficient and (ii) prejudiced the petitioner. *Strickland*, 466 U.S. at 687. This is a deferential standard, and "[s]urmounting *Strickland's* high bar is never an easy task." *Clark v. Arnold*, 769 F.3d 711, 725 (9th Cir. 2014) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

In assessing the performance factor of *Strickland's* two-part test, judicial review

"must be highly deferential" and the court must try not "to second-guess counsel's assistance after conviction." *Clark*, 769 F.3d at 725 (internal quotation marks and citation omitted). To be constitutionally deficient, counsel's representation must fall below an objective standard of reasonableness such that it was outside the range of competence demanded of attorneys in criminal cases. *Id.* A reviewing court considers "whether there is any reasonable argument" that counsel was effective. *Rogovich v. Ryan*, 694 F.3d 1094, 1105 (9th Cir. 2012).

To establish the prejudice factor of *Strickland's* two-part test, a petitioner must demonstrate 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. In other words, it must be shown that the "likelihood of a different result [is] substantial, not just conceivable." *Richter*, 562 U.S. at 112.

Although the performance factor is listed first in *Strickland's* two-part test, a court may consider the prejudice factor first. In addition, a court need not consider both factors if the court determines that a petitioner has failed to meet one factor. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998) (a court need not look at both deficiency and prejudice if the habeas petitioner cannot establish one or the other).

Finally, on federal habeas review, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 131 S.Ct. at 785. And "it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curium). "Relief is warranted only if no reasonable jurist could disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (internal quotation marks and citation omitted).

2. Analysis

In support of Ground Three, Petitioner states:

> During the State's final argument, the prosecutor repeatedly expressed his apparent personal support for the alleged victim's testimony and his distaste for the defendant. Despite these statements-which were essentially unanswered and allowed to stand- [Petitioner's] attorney did not object. The prosecutor's language should have been curbed by appropriate objections and order by the Court, but [Petitioner's] counsel simply allowed the prosecutor to vouch for his witness credibility, without providing the Court with the legal basis to remind the jury to disregard such inflammatory statements in a case where there was no evidence other than the word of the witness whose credibility was being vouched.

(Doc. 1 at 8). Respondents concede that Petitioner fairly presented Ground Three to the state courts in his PCR proceeding. (Doc. 7 at 21-22; Doc. 7-17 at 144-50; Doc. 7-17 at 181-86). The last state court decision reviewing the claim in Ground Three is the Arizona Court of Appeals' ruling that affirmed the trial court's denial of PCR relief. (Doc. 7-17 at 190). Because the Arizona Court of Appeals adopted the trial court's decision, the U.S. District Court may review the trial court's decision as part of the review of the Arizona Court of Appeals' decision. *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014) (explaining that when the last reasoned decision is a state appellate court decision which adopts or substantially incorporates lower state court decisions, the lower state court decisions may be reviewed as part of the review of the state appellate court's decision).

In its June 1, 2020 ruling, the trial court found that Petitioner failed to satisfy either prong of the *Strickland* test, explaining that the "'vouching' cited by Defendant is not improper vouching as defined by the Courts" because "it is not improper vouching for the prosecutor to compare and contrast a defendant's pretrial statements with trial testimony." (Doc. 7-17 at 178).

A defense attorney's failure to object during the prosecution's closing argument does not amount to deficient performance unless the prosecutor made egregious

misstatements. *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013) (stating that "[b]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct.") (citation omitted).

Here, Petitioner has not shown that his counsel's response to the prosecution's closing argument was deficient or prejudicial. As discussed in Section III(B)(2)(vii) above, the undersigned has found that the Arizona Court of Appeals reasonably found that the prosecutor did not engage in improper vouching during the prosecutor's closing argument. An attorney's "[f]ailure to raise a meritless argument does not constitute ineffective assistance." *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985); *see also Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996) (defense counsel's failure to raise a meritless argument or to take a futile action does not constitute ineffective assistance of counsel); *Toomey v. Bunnell*, 898 F.2d 741, 743-44 (9th Cir. 1990) ("[P]etitioner must further show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. . . . In short, we find the prospects of success of the motion . . . too remote for counsel's failure to have pressed [the issue] to have constituted a sixth amendment violation."). The undersigned finds that Petitioner has failed to show that the state courts' rejection of Ground Three is contrary to or an unreasonable application of *Strickland* or is based on an unreasonable determination of the facts. It is therefore recommended that the Court deny Ground Three.

C. Ground Four: Alleged Vindictive Prosecution

Ground Four of the Petition presents a vindictive prosecution claim. (Doc. 1 at 9). A prosecutor violates a defendant's constitutional right to due process of law when he brings additional charges solely to punish the defendant for exercising his rights. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). The habeas petitioner making a claim of such a violation bears the burden to show that "charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in

circumstances that give rise to an appearance of vindictiveness." *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982). The petitioner must show that the prosecutorial conduct would not have occurred "but for" the prosecutor's "hostility or punitive animus towards the defendant because he has exercised his specific legal rights." *Id.* at 1169; *see also United States v. Frega*, 179 F.3d 793, 802 (9th Cir. 1999) (no vindictiveness where defendant could not show that but for animus prosecutor would not have filed superseding indictment). The burden then shifts to the prosecutor to show a non-vindictive reason for bringing the charges. *Gallegos-Curiel*, 681 F.2d at 1168.

In Ground Four, Petitioner states that after the "first trial which led to a mistrial on the basis of prosecutorial misconduct, the State became vindictive and filed a notice of aggravators. However, the aggravators were never presented to the jury. Nevertheless the trial judge used the aggravators to enhance [Petitioner's] sentence 6.25 years more than the presumptive." (Doc. 1 at 9). The Arizona Court of Appeals rejected Petitioner's claim on direct appeal, stating:

> ¶ 37 After the court declared a mistrial and before the start of the second trial, the State filed a notice of aggravating circumstances, which included the prior felony convictions and two other circumstances. *See* A.R.S. § 13–701(D). The notice did not, however, expose Hollingsworth to more punishment in the second trial than if there had not been a mistrial.
>
> ¶ 38 The jury subsequently found Hollingsworth guilty, and, at the presentencing hearing, the State proved that he had two prior historical felony convictions. As a result, the court was free to consider those felony convictions, as well as any statutory aggravating and mitigating factors, A.R.S. § 13–701(D)—(E), including the letters Hollingsworth presented in mitigation. The court, as a result, considered the prior felonies and found that the presumptive term was 15.75 years and a maximum aggravated term of 35 years, and was free to consider any relevant aggravating factors that could be found by the fact of the conviction. *See Martinez,* 210 Ariz. at 583, ¶ 16, 115 P.3d at 623 (the sentencing court can exercise discretion within a sentencing range established by the fact of a prior conviction, facts found by a jury, or facts admitted by

> a defendant, and as a result, after a conviction, the court may consider any additional factors in determining what sentence to impose, so long as the sentence falls within the established range). As a result, the sentence imposed was within the court's discretion even if the State had not filed the notice of aggravating circumstances. Consequently, the record does not demonstrate that the trial court erred in denying the motion to dismiss based on prosecutorial vindictiveness. *See State v. Bonfiglio,* 228 Ariz. 349, 354, ¶ 21, 266 P.3d 375, 380 (App. 2011), *affirmed,* 231 Ariz. 371, 295 P.3d 948 (2013) (noting, "[a] trial court may use the same convictions to enhance or increase the sentencing range and to aggravate a defendant's sentence within the enhanced range"); *see also State v. Webb,* 140 Ariz. 321, 323, 681 P.2d 473, 475 (App. 1984) (concluding that there was no vindictive prosecution where "[t]he prosecutor did not charge [the defendant] with a higher crime").

(Doc. 7-17 at 102) (footnote omitted).

The Arizona Court of Appeals' conclusion above that the State's notice of aggravating circumstances did not "expose [Petitioner] to more punishment in the second trial than if there had not been a mistrial" is supported by the record. On January 9, 2012, before Petitioner's first trial, the State filed an Allegation of Prior Conviction(s) that amended the Indictment to allege that Petitioner had seven prior felony convictions.[7] (Doc. 7-1 at 3). On June 27, 2012, the day Petitioner's first trial commenced, the trial court stated that based on the allegation of Petitioner's prior convictions, Petitioner would be considered a Category 3 repetitive offender and could be subject to a 35-year sentence. (Doc. 7-1 at 34). The trial court explained to Petitioner:

> as a Category 3 repetitive offender, if you are convicted of either one of these kidnapping charges, the Court won't have any option but to send you to prison if the State's able to show those prior felony convictions they've alleged, and the

[7] All the alleged prior convictions are from the Maricopa County Superior Court and are as follows: (i) Possession of Dangerous Drugs with One Historical Prior Felony Conviction, a class four felony; (ii) Theft of Means of Transportation with One Historical Prior Felony Conviction, a class three felony; (iii) two convictions for Failure to Register as a Sex Offender, a class four felony; (iv) two convictions for Possession of Dangerous Drugs, a class four felony; and (v) Aggravated Driving Under the Influence, a class five felony. (Doc. 7-1 at 3-4).

> presumptive term of imprisonment would be 15.75 years. I could reduce that to as low as 10 and a half years, or I could increase it to as much as 35 years.

(*Id.*). The trial court asked Petitioner: "Do you understand the prison range if you're convicted at trial?" (*Id.*). Petitioner replied "Yes, Your Honor, I do." (*Id.*).

The Arizona Court of Appeals correctly concluded that the trial court's imposition of a 22-year sentence was within the court's discretion even if the State had not filed the notice of aggravating circumstances. "[T]he doctrine of vindictive prosecution does not apply when, as here, there has been no increase in the severity of the charge or the sentence imposed." *United States v. Kinsey*, 994 F.2d 699, 701 (9th Cir. 1993). The Arizona Court of Appeals reasonably rejected Petitioner's claim in Ground Four. Accordingly, the undersigned recommends that the Court deny Ground Four.

IV. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Court **DISMISS WITH PREJUDICE** Ground Two of the Petition (Doc. 1) and **DENY** Grounds One, Three, and Four on the merits.

IT IS FURTHER RECOMMENDED that the Court deny Petitioner's "Petition for Reconsideration" (Doc. 14) that seeks reconsideration of the Court's Order (Doc. 13) denying Petitioner's Motion (Doc. 11) requesting copies of case law or other legal authority used in Respondents' Answer or Court orders.

IT IS FURTHER RECOMMENDED that a certificate of appealability and leave to proceed in forma pauperis on appeal be denied because dismissal of Ground Two is justified by a plain procedural bar and Petitioner has not made a substantial showing of the denial of a constitutional right in his remaining claims for relief.

This Report and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) 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 Report and

Recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated this 8th day of August, 2022.

Honorable Eileen S. Willett
United States Magistrate Judge

Exhibit C

Court of Appeals order

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

CURTIS BENJAMIN HOLLINGSWORTH, *Appellant.*

No. 1 CA-CR 12-0684
FILED 3-3-2016

Appeal from the Superior Court in Yavapai County
No. P1300CR201101229
The Honorable Tina R. Ainley, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Yavapai County Public Defender's Office, Prescott
By Robert K. Gundacker
Counsel for Appellant

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Donn Kessler and Judge Peter B. Swann joined.

P O R T L E Y, Judge:

¶1 Curtis Benjamin Hollingsworth appeals his conviction and sentencing for kidnapping. In this case, we must resolve two issues. First, did the trial court violate Hollingsworth's right to be free from double jeopardy by allowing him to be retried after the prosecutor's pretrial and trial conduct caused a mistrial? Second, did the prosecutor's misconduct in the second trial warrant reversal? For the following reasons, we affirm.

FACTUAL[1] AND PROCEDURAL BACKGROUND

¶2 While driving his Buick in Cordes Lakes in December 2011, Hollingsworth followed the victim, a seventeen-year-old girl taking an evening walk. When the victim realized she was being followed, she ran and thought she was safe when she saw the Buick parked next to a store. But as she walked past a church parking lot, the Buick came towards her and, before she could run, Hollingsworth opened the driver's side door, grabbed her right wrist and told her to "[g]et in my car." Although he grabbed her hard enough to leave marks on her wrist, she broke free and ran into the front yard of a nearby house. Hollingsworth drove slowly by the front of the house, but sped away after the victim yelled at him.

¶3 The victim ran home, told her mother about the incident, and her mother called 9-1-1. The victim gave the deputy sheriff a detailed description of the Buick, including its license plate number. She also told the deputy that she saw the driver, and described the shirt he was wearing as either "yellow or cream-colored" with "dark stripes going down vertically," and told the deputy that the driver had a beer belly.

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶4 The sheriff's office quickly traced the license plate to Hollingsworth, and a deputy went to Hollingsworth's house. The deputy saw a Buick that matched the description and the license plate number given by the victim parked in front of Hollingsworth's house. He touched the car, and the front grille area felt warm, which indicated that the car had been driven recently. Hollingsworth answered the front door wearing a shirt that matched the description of the shirt given by the victim. After getting a warrant, the deputies searched Hollingsworth's car, and found a box of condoms in the glove compartment.

I. First Trial

¶5 Hollingsworth was arrested, charged and the case proceeded to trial. Although all the police reports and discovery materials indicated that the victim said she could not see the driver's face, the prosecutor asked, "Is that man who was driving in the vehicle in the courtroom today?" The victim affirmatively identified Hollingsworth. Then, over objection, the prosecutor introduced Exhibit 170, a picture of Hollingsworth in the shirt when he was arrested, and Exhibit 171, a photograph of an officer holding the shirt Hollingsworth was wearing when he was arrested.

¶6 During the cross-examination of the victim, the following exchange occurred:

> Defense Counsel: And all you could see was a cream-colored shirt with dark stripes?
>
> Victim: (Nodding head affirmatively.)
>
> Defense Counsel: Yes?
>
> Victim: Yes.
>
> Defense Counsel: And you could not see his face.
>
> Victim: No.
>
> Defense Counsel: The officers never did a photo lineup with you, did they?

Victim: No.

Defense Counsel: *So when you identified Mr. Hollingsworth earlier, you're not sure that's him.*

Victim: *They showed me a picture afterwards.*

Defense Counsel: Who showed you a picture?

Victim: They showed me when I went to the courtroom. When I came in to talk to them, *they asked me if this is the shirt and this is the guy inside the Buick.*

Defense Counsel: The State did that, or the Victim Services?

Victim: I don't know.

Defense Counsel: [The prosecutor] or Julie . . . Judy?

Victim: They showed me the picture.

Defense Counsel: Who?

Victim: The people you just identified.

Defense Counsel: When did they show you this picture?

Victim: When I first talked to them.

Defense Counsel: And how long ago was that?

Victim: I don't remember.

[* * * *]

Victim: When I first met him.

Defense Counsel: And when was that?

Victim: Maybe a month ago.

Defense Counsel: When did Judy show you the picture?

Victim: They were together.

Defense Counsel: They were together a month ago. *But on December 4th, 2011, you could not identify this person.*

Victim: *No.*

(Emphasis added.)

¶7 On redirect, the victim said:

Prosecutor: What have I continuously told you?

Victim: Tell nothing but the truth.

Prosecutor: Have you been telling the truth?

Victim: Yes.

Prosecutor: *[W]hen I showed you this photo, Exhibit 170, did I simply ask you if you recognized who that was?*

Victim: Yes.

Prosecutor: Who is that?

Victim: That's Curtis.

Prosecutor: Do you have any doubts whatsoever, that this man right here – right here – You see him?

Victim: Yes.

Prosecutor: —is the man who grabbed you that night on December 4th?

Victim: No.

(Emphasis added.)

II. Motion for Mistrial

¶8 Hollingsworth moved to preclude the victim's pretrial and in-court identifications under *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). He argued that the pretrial identification made one month before trial was tainted and unduly suggestive, and the in-court identification should have been precluded because the State never disclosed that the victim could now identify Hollingsworth.

¶9 The court held a separate evidentiary hearing, and the parties stipulated that the court could review the transcript of the victim's trial testimony. Detective Marvin Cline, who interviewed Hollingsworth, testified about Hollingsworth's statements, which were similar to the victim's statements. The detective testified that Hollingsworth admitted that he had driven by a young female wearing clothes similar to the victim's apparel while he was in Cordes Lakes earlier that evening. Hollingsworth explained, however, that the girl had been walking in the middle of the road, in his lane of travel, and that, when he slowed his vehicle down to pass her, the girl yelled at him something to the effect of, "Get out of here." He also said that she might be able "to identify him because he had slowed down to go by her."

¶10 After submitting the evidence, the prosecutor acknowledged that showing the victim a one-person photograph before trial would be a suggestive pretrial identification procedure. He argued, however, that in light of *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972), the victim's identification of Hollingsworth should not be precluded given her detailed description of Hollingsworth's vehicle, license plate number, and shirt.

¶11 Hollingsworth then orally amended his *Dessureault* motion to request a mistrial or dismissal, and argued that the prosecutor admitted showing the victim a photograph of Hollingsworth wearing the shirt and, on redirect, admitted that he showed the victim the picture about a month before trial. Hollingsworth also argued that not only was the victim's identification tainted, but that none of the information had been provided

before trial; as a result, the conduct amounted to prosecutorial misconduct and violated his right to a fair trial.

¶12 The court recognized that before trial the victim "could not identify the [attacker's] face or hair color," but at trial the victim was "one hundred percent positive that [Hollingsworth] was her attacker," and the court noted there was no testimony explaining why the victim was suddenly sure Hollingsworth was the attacker. After considering the evidence, including the length of time between the crime, the identification, and the victim's testimony, the court granted a mistrial because "the photo shown to the victim prior to the trial was unduly suggestive."

III. Motion to Dismiss for Double Jeopardy and Vindictive Prosecution

¶13 Before the second trial, and citing *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984), Hollingsworth moved to dismiss the case with prejudice due to prosecutorial misconduct and due process violations. He argued that the prosecutor had either "knowingly and intentionally tampered with his primary witness" or acted with indifference to the danger of a mistrial or reversal to obtain a tactical advantage and a conviction. He also argued that the State's allegations of aggravating factors in the second trial violated due process as a vindictive prosecution.

¶14 In response, the State noted that in the meeting before the first trial the victim had said that she would not forget Hollingsworth's face. Then, when reviewing trial exhibits with the victim, the prosecutor showed her Exhibit 170, the photograph of Hollingsworth wearing the shirt. The prosecutor asserted that although he made a mistake by showing the victim the photograph, he did not have an improper purpose or intend to act improperly. The State also argued that the mistrial and the court's preclusion of the pretrial and in-court identifications were sufficient sanctions. The State also mentioned the victim told the prosecutor after the mistrial, and for the first time, that she had searched the internet before the first trial looking for Hollingsworth, and found information about him, including his photograph and the fact that he was a level three sex offender.

¶15 The trial court held an evidentiary hearing. After the hearing, the trial court denied the motion to dismiss. Although the court found that the prosecutor's conduct was the basis for the mistrial, the court did not find that Hollingsworth had proved prosecutorial misconduct under *Pool*, and, after looking at all the facts and evidence, found that the experienced prosecutor had made a mistake.

¶16 Hollingsworth filed a special action petition challenging the ruling, but his petition was denied. The second trial proceeded, and based on the court's rulings in the first trial, the prosecutor did not ask and the victim did not identify Hollingsworth directly or with the photograph of him in the shirt. At the conclusion of the trial, Hollingsworth was convicted of kidnapping. After the court found that he had two prior historical felony convictions at the sentencing hearing, Hollingsworth was sentenced to twenty-two years in prison, with credit for presentence incarceration.[2] We have jurisdiction under the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033.[3]

DISCUSSION

I. Double Jeopardy

¶17 Hollingsworth contends that the trial court erred in denying his motion to dismiss the second trial for violation of double jeopardy. We disagree.

¶18 "The double jeopardy clause of the Fifth Amendment protects a criminal defendant from multiple prosecutions for the same offense." *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 27, 55 P.3d 774, 780 (2002) (citation omitted). The Arizona Constitution "provides the same protection in article 2, section 10, stating that no person shall be 'twice put in jeopardy for the same offense.'" *Id.* The protections afforded by the double jeopardy clause are not absolute, and "[a]s a general rule, if the defendant successfully moves for . . . a mistrial, retrial is not barred on double jeopardy grounds." *Id.* at ¶ 28. There are, however, circumstances, like *Pool*, where intentional and pervasive misconduct on the part of the prosecution structurally impairs the trial and destroys the ability of the tribunal to reach a fair verdict. *Id.* at 781, ¶ 29, 55 P.3d at 781.

¶19 To resolve the claim that the trial court erred by denying the double jeopardy motion to bar the retrial, "[w]e review a trial court's decision whether to dismiss a prosecution with prejudice under [*Pool*] for an abuse of discretion." *State v. Korovkin*, 202 Ariz. 493, 495, ¶ 5, 47 P.3d 1131, 1133 (App. 2002) (citation omitted); *see State v. Cuffle*, 171 Ariz. 49, 51, 828 P.2d 773, 775 (1992) (noting that "[a]ppellate review of a trial court's findings of fact is limited to a determination of whether those findings are

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[2] Hollingsworth does not appeal his conviction for misdemeanor assault.

[3] We cite the current version of the statute unless otherwise noted.

clearly erroneous"); *see also United States v. Lopez-Avila*, 678 F.3d 955, 961 (9th Cir. 2012) ("When reviewing a denial of a motion to dismiss on double jeopardy grounds before trial [based on prosecutorial misconduct], this court reviews de novo legal questions but reviews factual findings, including those on which denial may be based, for clear error.") (internal citations and quotation marks omitted). We then review de novo whether double jeopardy should have barred the retrial, a question of law. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18, 94 P.3d 1119, 1132 (2004). Accordingly, to the extent Hollingsworth argues the court erred in finding the prosecutor did not merely make a mistake in showing the victim the photograph of him in the shirt, we review for clear error. And to the extent Hollingsworth argues the court erred in applying those facts to the law, we review de novo.

¶20 In *Pool*, our supreme court stated:

> We hold, therefore, that jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:
>
> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

139 Ariz. at 108-09, 677 P.2d at 271-72.

¶21 The parties agree that the first and third elements were satisfied. As a result, we have to decide whether the trial court committed clear error in finding that Hollingsworth failed to establish the second element. The second element of the *Pool* analysis can be dissected into three subparts for analysis:

(a) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but,

(b) taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and

(c) which [the prosecutor] pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal. *Id.; see State v. Trani*, 200 Ariz. 383, 384, ¶ 7, 26 P.3d 1154, 1155 (App. 2001) (discussing the second element of the *Pool* analysis).

¶22 To decide whether a prosecutor's conduct, in the totality of the circumstances, amounts to "intentional conduct which the prosecutor knows to be improper and prejudicial," a court should "measure what the prosecutor 'intends' and 'knows' by objective factors, which include the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion." *Pool*, 139 Ariz. at 108-09 n.9, 677 P.2d at 271-72 n.9. And the court may also consider "the prosecutor's own explanations of his 'knowledge' and 'intent' to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers." *Id.*

¶23 Hollingsworth argues that the evidence shows that the prosecutor acted with intent and was indifferent to the danger of causing a mistrial. The trial court, however, found that the prosecutor's conduct resulted from a mistake.

¶24 Based on the record, we cannot state that the trial court's finding that the prosecutor's actions resulted from a mistake during his final trial preparations is clearly erroneous. *See State v. Lamar*, 205 Ariz. 431, 440, ¶ 45, 72 P.3d 831, 840 (2003), *supplemented by* 210 Ariz. 571, 115 P.3d 611 (2005) (noting that we will reverse a trial court's finding of fact that the prosecutor's actions were not intentional if it is clearly erroneous). At the evidentiary hearing, the victim on direct examination testified:

Defense Counsel: So [the prosecutor] knew that you couldn't see the face of your attacker.

Victim: Yes.

[* * * *]

Defense Counsel: What did he say when he showed you that picture?

Victim: Is this the shirt?

Defense Counsel: He didn't say, "Is this the face?"

Victim: No.

¶25 On cross-examination, she testified that the prosecutor had shown her several photographs of a map, of her neighborhood, and of a vehicle that would be exhibits at trial and had asked her if she "recognized these photographs." The following exchange then took place:

Prosecutor: Do you recall telling me, on June 21st, that you knew the defendant's face, and it was words to the effect that you wouldn't forget it?

Victim: I don't remember.

Prosecutor: Do you remember saying something about the pockmarks on his cheeks?

Victim: Yes.

Prosecutor: And you told me that prior to trial on June 21st.

Victim: Can you explain what you are trying to ask?

Prosecutor: You told me that prior to the trial beginning.

Victim: Oh, yes.

Prosecutor: Which indicated to me that you knew who Mr. Hollingsworth was.

Victim: Yes.

¶26 On redirect, the victim said that she could not see her attacker's face on the night of the incident. But she said that because Hollingsworth was the only person in the car with a shirt, she assumed it was Hollingsworth when she saw his picture.

¶27 The prosecutor then testified[4] that he had two meetings with the victim before trial: the first on June 12, to give her a copy of the transcript of her interview with Detective Surak; and the second on June 21, to review trial exhibits. During the second meeting, the victim said that she "would not forget Mr. Hollingsworth's face" and "indicated something about the pockmarks on his cheeks," and then he showed her the photograph of Hollingsworth "wearing the shirt that she had described to the detectives." The prosecutor acknowledged that it was a mistake to show her Hollingsworth's photograph, but maintained that he had not indicated to her "in any way, shape or form that this was the person who had grabbed her on December 4." And he only asked her, "if she recognized that photograph."

¶28 On cross-examination, the prosecutor acknowledged reading the police reports and knowing those reports stated that the victim could not see the attacker's face. When asked why he had not then disclosed that the victim could now identify the attacker, the prosecutor said there were multiple police reports and numerous transcripts and audiotapes, and he made a mistake forgetting that she had given previous contrary statements. He acknowledged then that he should have known that showing the victim Hollingsworth's photograph could cause a mistrial, but he did not intend to cause a mistrial. Furthermore, he said that the victim's "confidence that she could identify Mr. Hollingsworth" caused him to "show her a

[4] At oral argument, Hollingsworth's counsel asserted that the prosecutor was not under oath when he testified at the hearing. We requested supplemental briefing to address if the prosecutor was under oath. Both parties agree, and the record shows, that the prosecutor was under oath and subject to cross-examination when he testified.

photograph of the shirt with Mr. Hollingsworth wearing it, instead of just the shirt."

¶29 Although our review of the record demonstrates that the prosecutor never answered why he failed to disclose to the defense that he showed the victim a picture of Hollingsworth in the shirt and that she readily was able to identify him, the court accepted the prosecutor's explanation that he was negligent and made a mistake by showing the victim Hollingsworth's photograph wearing the shirt, instead of a photograph of just the shirt. The court based its ruling, in part, on the victim's testimony that the prosecutor asked her, while showing her the photograph at their pretrial meeting, "Is this the shirt?" That question supports the court's conclusion that the prosecutor was only showing the victim the photo to identify the shirt; the prosecutor thought the victim had told him she would never forget Hollingsworth's face, so showing her the photo of Hollingsworth in the shirt was only meant to have her identify the shirt. Consequently, and regardless of whether we would have reached the same conclusion or limited the sanction to a mistrial, there is factual support for the court's finding. As a result, we cannot find that the court clearly erred in finding the prosecutor simply made a mistake in showing the photo to the victim. *See Lamar*, 205 Ariz. at 440, ¶ 45, 72 P.3d at 840.[5]

¶30 Hollingsworth also contends that the trial court had an erroneous view of law because the court only focused on the prosecutor showing the victim the photograph instead of reviewing all the alleged prosecutorial misconduct. *Pool* requires the court to review whether the "[m]istrial is granted because of improper conduct or actions by the prosecutor; and . . . [whether] *such conduct* is not merely the result of legal error, negligence, mistake, or insignificant impropriety." 139 Ariz. at 108-09, 677 P.2d at 271-72 (emphasis added).

¶31 The court granted Hollingsworth's motion for mistrial because the prosecutor showed the victim the unduly suggestive photograph of Hollingsworth in the shirt. The court then focused on whether the prosecutor acted with intent or was negligent, and found that he negligently made a mistake in preparing for trial. Although the prosecutor failed to timely disclose the new information which was

[5] Because we affirm the trial court's finding that the prosecutor's actions were the result of a mistake, we need not address Hollingsworth's arguments that the prosecutor's actions were intentional and demonstrated an indifference to a significant risk of mistrial or reversal. *See Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

material, the court focused on the unduly suggestive photograph because it was the linchpin that ultimately led to the declaration of the mistrial. As a result, it was not the lack of disclosure that led to the mistrial (even though disclosure could have resulted in the court's earlier intervention to resolve the issue), but showing the victim the unduly suggestive photograph. Given that the court was aware that the State had not disclosed the information at any time before trial, but focused on the unduly suggestive photograph, we do not find that the failure to integrate the disclosure violation requires us to grant the double jeopardy motion.

II. Prosecutorial Vindictiveness

¶32 Hollingsworth argues that the trial court erred by denying his motion to dismiss for prosecutorial vindictiveness. We disagree.

¶33 Prosecutorial vindictiveness occurs when a prosecutor makes a decision to punish or increase the punishment because the defendant exercised a protected legal right. *State v. Mieg*, 225 Ariz. 445, 447, ¶ 10, 239 P.3d 1258, 1260 (App. 2010). We must distinguish "between the acceptable vindictive desire to punish [a defendant] for any criminal acts, and vindictiveness which violates due process." *Id.* at 448, ¶ 12, 239 P.3d at 1261 (quoting *United States v. Doran*, 882 F.2d 1511, 1518 (10th Cir. 1989) (internal quotation marks omitted). As a result, we review a trial court's ruling on a motion to dismiss for vindictive prosecution for an abuse of discretion. *Mieg*, 225 Ariz. at 447, ¶ 9, 239 P.3d at 1260; *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997). A court abuses its discretion when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted).

¶34 Hollingsworth argued that the State acted vindictively after the mistrial was granted by filing a notice alleging aggravating circumstances that the State had not alleged in the first trial. Hollingsworth, however, conceded that the State alleged historical prior felonies, but argued that it was not fair to allow the State to allege the prior convictions as aggravating circumstances in the second trial because it was possible that the State would not have proved the prior felonies. After finding that Hollingsworth had not met his burden, the court then denied the motion to dismiss.

¶35 Hollingsworth argues that the trial court did not apply the proper legal standard. A trial court, however, is presumed to know and apply the law correctly. *State v. Williams*, 220 Ariz. 331, 334, ¶ 9, 206 P.3d

780, 783 (App. 2008) (noting that "[t]rial judges are presumed to know the law and to apply it in making their decisions") (internal citations and quotation marks omitted). And "[a] trial judge is not required to expressly state the burden of proof applied; [instead, this Court] assume[s] the judge applied the proper burden of proof." *In re William L.*, 211 Ariz. 236, 238, ¶ 7, 119 P.3d 1039, 1041 (App. 2005).

¶36 In *United States v. Goodwin*, the Supreme Court stated that a defendant may prove prosecutorial vindictiveness either by: (1) showing actual vindictiveness "through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights," or (2) showing that the circumstances provide for a "presumption of vindictiveness." 457 U.S. 368, 380-81 n.12 (1982); *see Brun*, 190 Ariz. at 507-08, 950 P.2d at 166-67 (Arizona follows the Supreme Court standard on presumed prosecutorial vindictiveness). Here, before the first trial, the State alleged Hollingsworth had prior felony convictions, and the court held an Arizona Rule of Evidence 609 hearing. And before that trial, the court told Hollingsworth that, if he was convicted, he could be sentenced to prison from a range of 10.5 to 35 years.

¶37 After the court declared a mistrial and before the start of the second trial, the State filed a notice of aggravating circumstances, which included the prior felony convictions and two other circumstances. *See* A.R.S. § 13-701(D). The notice did not, however, expose Hollingsworth to more punishment in the second trial than if there had not been a mistrial.

¶38 The jury subsequently found Hollingsworth guilty, and, at the presentencing hearing, the State proved that he had two prior historical felony convictions. As a result, the court was free to consider those felony convictions, as well as any statutory aggravating and mitigating factors, A.R.S. § 13-701(D) - (E), including the letters Hollingsworth presented in mitigation. The court, as a result, considered the prior felonies and found that the presumptive term was 15.75 years and a maximum aggravated term of 35 years,[6] and was free to consider any relevant aggravating factors that could be found by the fact of the conviction. *See Martinez*, 210 Ariz. at 583, ¶ 16, 115 P.3d at 623 (the sentencing court can exercise discretion within a sentencing range established by the fact of a prior conviction, facts found by a jury, or facts admitted by a defendant, and as a result, after a

[6] In addition to the prior felonies, because one of Hollingsworth's prior felonies was the failure to register as a sex offender, the court considered the need to protect the community as an aggravating circumstance. *See State v. Martinez*, 210 Ariz. 578, 583, ¶ 16, 115 P.3d 618, 623 (2005).

conviction, the court may consider any additional factors in determining what sentence to impose, so long as the sentence falls within the established range). As a result, the sentence imposed was within the court's discretion even if the State had not filed the notice of aggravating circumstances. Consequently, the record does not demonstrate that the trial court erred in denying the motion to dismiss based on prosecutorial vindictiveness. *See State v. Bonfiglio*, 228 Ariz. 349, 354, ¶ 21, 266 P.3d 375, 380 (App. 2011), *affirmed*, 231 Ariz. 371, 295 P.3d 948 (2013) (noting, "[a] trial court may use the same convictions to enhance or increase the sentencing range and to aggravate a defendant's sentence within the enhanced range"); *see also State v. Webb*, 140 Ariz. 321, 323, 681 P.2d 473, 475 (App. 1984) (concluding that there was no vindictive prosecution where "[t]he prosecutor did not charge [the defendant] with a higher crime").

III. Prosecutorial Misconduct in the Second Trial

¶39 Hollingsworth argues that the prosecutor's misconduct in the second trial warrants reversal. Hollingsworth did not object to any prosecutorial misconduct in the second trial, so we review for fundamental error. *See State v. Dixon*, 226 Ariz. 545, 549, ¶ 7, 250 P.3d 1174, 1178 (2011) (stating that "[b]ecause [there was] no claim of prosecutorial misconduct below, we review for fundamental error."); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶40 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Because "[m]isconduct alone will not cause a reversal," *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983), "[t]he focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶41 Error is fundamental if it goes to the "foundation of [the] case, takes away a right that is essential to [the] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608. "To qualify as 'fundamental error' . . . the error must be clear, egregious, and curable only via a new trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). For prosecutorial misconduct to qualify as fundamental error, the error must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Harrod*, 218 Ariz. 268, 278, ¶ 35, 183 P.3d 519, 529 (2008)

(quoting *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191). In addition, once fundamental error has been established, a defendant must show that the error was prejudicial before we will reverse a verdict. *Henderson*, 210 Ariz. at 568-69, ¶ 26, 115 P.3d at 608-09.

¶42 Ordinarily, Arizona does not recognize the cumulative error doctrine because "something that is not prejudicial error in and of itself does not become such error when coupled with something else that is not prejudicial error." *State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996). Prosecutorial misconduct cases are, however, the exception because "this general rule [of cumulative error] does not apply when the court is evaluating a claim that prosecutorial misconduct deprived defendant of a fair trial." *Hughes*, 193 Ariz. at 78-79, ¶ 25, 969 P.2d at 1190-91. Consequently, if we find more than one instance of prosecutorial misconduct, it may amount to enough to create prejudice to warrant a new trial.

A. Opening Statement

¶43 Hollingsworth first asserts that the prosecutor's misconduct during his opening statement warrants reversal because the State commented on his right to remain silent. We disagree.

¶44 During the opening statement the prosecutor, previewing what the jurors would hear about Hollingsworth's interview with the sheriff deputy, said:

> [Hollingsworth] indicated that the vehicle, the '94 Buick, was his vehicle; that's the vehicle he had been driving in Cordes Lakes. And importantly, when asked when he simply drove by this girl who was walking in the road and she said, "Hey, get out of here," it was the defendant's recollection that his windows were rolled up and he [said h]e could hear her through this rolled-up glass. That's the only contact the defendant indicated, or *would admit to*, to the deputies.

(Emphasis added.)

¶45 The challenged statement — "[t]hat's the only contact the defendant indicated, or would admit to, to the deputies" — was the only reference in the State's opening statement about what the State hoped or intended to present to the jury. In part, it was factual, and the State went

on to prove that Hollingsworth voluntarily made the pretrial statement that he was driving, saw the girl walking in the road, and told her to get out of here. Although there was no basis for the part of the statement that "or [he] would admit to," it was not about Hollingsworth's future decision about testifying at trial, nor about his invocation of his constitutional rights, nor does it imply that the jury could find Hollingsworth guilty because he would not admit to further facts to the deputies. Even though part of the statement was an inappropriate comment on the fact that Hollingsworth did not confess, it was tempered by the fact that the jury was instructed just before opening statements that "[s]tatements or arguments made by the lawyers in th[is] case are not evidence." The same instruction was included in the final instructions given to the jury, and we presume, in the absence of evidence to the contrary, that juries follow their instructions. *See State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

¶46 Moreover, Hollingsworth cites to cases where a prosecutor made the statement during closing argument, which reflected that the defendant did not testify; a clear violation of law. *See* A.R.S. § 13-117(B); *State v. Shing*, 109 Ariz. 361, 364, 509 P.2d 698, 701 (1973). That standard does not apply here because the statement was made in the opening statement and subject to future proof, and we will not assume that the jury interpreted the prosecutor's statement in a manner most damaging to the defense. *See Houston v. Roe*, 177 F.3d 901, 909 (9th Cir. 1999) (recognizing that a reviewing "'court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'") (quoting *Donnelly*, 416 U.S. at 647). Additionally, the court in both its preliminary instructions and final instructions not only instructed the jury that the State was required to prove each element of each offense beyond a reasonable doubt, but also told the jury that a defendant has a constitutional right not to testify at trial and the exercise of that right cannot be considered by the jury in determining whether a defendant is guilty or not guilty. As a result, we do not find that the prosecutor's statement during the opening statement is prosecutorial misconduct, nor do we find fundamental or any resulting prejudice. *See State v. Anderson*, 210 Ariz. 327, 341-42, ¶¶ 50-52, 111 P.3d 369, 383-84 (2005) (finding no error in prosecutor's statement because the court had admonished the jury that the lawyers' statements were not evidence).

B. Questions to Witnesses

¶47 Hollingsworth next argues that the prosecutor's misconduct during witness examinations warrants reversal. Specifically,

Hollingsworth contends that the prosecutor inflamed the jury when he elicited testimony from the victim that she "doesn't go walking by herself anymore." After cross-examination of the victim, which implied the victim was fabricating her testimony, the victim's mother testified that the victim is more cautious and does not go walking by herself anymore. The testimony was proper because it substantiated the victim's testimony and was designed to undermine the inference that she was fabricating her testimony. *See State v. Thomas*, 130 Ariz. 432, 434, 636 P.2d 1214, 1216 (1981) (observing that "any evidence which substantiates the credibility of a prosecuting witness on the question of guilt is relevant and material") (citation omitted). Accordingly, we find no misconduct by the prosecutor's questions to the victim or her mother, which was a response to undermine the inference that the victim fabricated her testimony.

¶48 Hollingsworth also maintains that the prosecutor "back-doored" hearsay testimony by asking each responding deputy what was the nature of the call. The record shows that the prosecutor was eliciting the testimony to set the foundation for the deputies' testimony, and the testimony was not hearsay because it was not admitted to prove the truth of the matter asserted. *See State v. Tucker*, 215 Ariz. 298, 315, ¶ 61, 160 P.3d 177, 194 (2007) (noting "testimony that is not admitted to prove its truth is not hearsay"). Thus, the prosecutor's questions did not amount to misconduct.

¶49 Next, Hollingsworth asserts that the prosecutor engaged in bolstering by asking the victim if she was "mad at her mother, was seeking attention, or had any reason to lie." The question and resulting testimony was not about bolstering, but concerned the victim's lack of a motive to testify falsely. The question, as a result, is not improper bolstering but an attempt to mitigate the anticipated cross-examination, which would explore the victim's motivation to falsify the occurrence. *See State v. Vazquez*, 830 A.2d 261, 271 n.10 (Conn. App. 2003) (stating that because a witness's motivation to lie may be explored on cross-examination, it may also be discussed during direct examination).

¶50 Hollingsworth also asserts that the prosecutor had the victim characterize the evidence by asking her on redirect examination if certain facts brought out during cross-examination "meant she was lying," and if she had been lying, why would she "continue to lie." The record shows that the prosecutor's questions during redirect were a response to Hollingsworth's impeachment during cross-examination. *See, e.g., Jones v. State*, 733 S.E.2d 400, 405 (Ga. App. 2012) (concluding that prosecutor could ask the victim "if she was telling the truth" on redirect after "defense

counsel attempted to impeach the victim's credibility"). As a result, the question was not impermissible, and we find no misconduct.

¶51 Finally, Hollingsworth asserts that the prosecutor misled the jurors about the lack of a photo line-up. Hollingsworth complains that the prosecutor asked the detective why a lineup was not conducted, and the detective said, "[The victim] did say she did not see his face clear enough that she would be able to identify him in any photo." The question and answer were designed to explain why the police did not conduct a photographic line-up to have the victim identify her assailant. As a result, the prosecutor did not mislead the jury about the lack of a photo line-up. Consequently, we do not find any fundamental error or any resulting prejudice.

C. Closing Argument

¶52 Hollingsworth next argues that the prosecutor's closing argument warrants reversal. We disagree.

¶53 Prosecutors generally are afforded wide latitude during closing argument. *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). They, however, may not "make arguments which appeal to the passions and fears of the jury." *Id.* A prosecutor's remarks are improper if they call the jurors' attention to matters that they would not be justified in considering in determining their verdict and it is probable that the jurors were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000); *State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). Thus, "[w]e will not reverse a conviction because of a prosecutor's improper comments during closing argument unless there is a reasonable likelihood that the misconduct could have affected the jury's verdict." *State v. Edmisten*, 220 Ariz. 517, 524, ¶ 23, 207 P.3d 770, 777 (App. 2009) (internal citations and quotation marks omitted).

¶54 Hollingsworth argues that the prosecutor improperly compared his statements with the victim's testimony. Here, the prosecutor referred to the victim's testimony as "sworn," "under oath," and "subject to cross-examination." Hollingsworth, however, has cited no authority, and we have found none, for the proposition that a prosecutor cannot compare and contrast a defendant's pretrial statements with trial testimony. *See, e.g., State v. Hebert*, 697 So.2d 1040, 1045-46 (La. App. 1997) (where the "prosecutor was attempting to compare and contrast the state's evidence given by witnesses under oath with the unsworn statement of

defendant," the comments were "not intended to draw the jury's attention to defendant's failure to testify"). Consequently, we find no error.

¶55 Hollingsworth also contends that the prosecutor improperly told the jurors that the victim's statements were "uncontroverted" and "unchallenged." The record shows that the prosecutor's statements were focusing on the victim's statement that she did not know Hollingsworth. And there is no evidence in the record controverting or challenging the victim's statement. *See State v. Kerekes*, 138 Ariz. 235, 239, 673 P.2d 979, 983 (App. 1983) ("Not every reference to the fact that testimony has been uncontroverted necessarily focuses on the appellant's exercise of his right not to testify."). Again, we find no error.

¶56 Next, Hollingsworth argues that the prosecutor improperly commented on the defense's closing argument. The record demonstrates that the prosecutor commented on the defense's closing, but the prosecutor was criticizing Hollingsworth's theory that the offense did not happen or, if it did, he did not commit the offense. The prosecutor, as a result, did not improperly comment on Hollingsworth's closing argument. *See United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) ("Criticism of defense theories and tactics is a proper subject of closing argument."); *see also State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990) (concluding that prosecutor did not engage in misconduct when he characterized the defendant's defense as a "smoke screen" and called the defense counsel's argument "outrageous").

¶57 Hollingsworth also asserts that the prosecutor engaged in vouching when he said, "I believe the evidence shows that this [was] a kidnapping." "Vouching occurs when a prosecutor places the prestige of the government behind a witness or when the prosecutor suggests that information not presented to the jury supports a witness's testimony." *State v. Rosas-Hernandez*, 202 Ariz. 212, 219, ¶ 26, 42 P.3d 1177, 1184 (App. 2002). Here, the prosecutor was summing up his argument and was asking the jury to find Hollingsworth guilty. When read in context, the prosecutor's statement is not vouching as it has been defined in Arizona. *See id.*; *State v. Lee*, 185 Ariz. 549, 554, 917 P.2d 692, 697 (1996) (holding that when read in context the prosecutor's comments, "[n]ow she's been, I think, honest when she says she wasn't even aware that [other witnesses] had seen her" and "I think [another witness] was an honest man, certainly an honest man, but I think he made an honest mistake" were not vouching).

¶58 Finally, Hollingsworth argues that the prosecutor committed misconduct by calling him a "predator." The use of the term was a single isolated statement the prosecutor made after discussing the evidence that supported the assertion that Hollingsworth followed the victim and planned to sexually assault her. Although the use of the term "predator" was excessive and emotional language, *see Jones*, 197 Ariz. at 305, ¶¶ 36–37, 4 P.3d at 360 (noting that "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal") (internal citations and quotation marks omitted), the isolated use of the term was not misconduct warranting reversal of the conviction. Consequently, no prejudicial fundamental error was committed during the closing arguments that so permeated the trial that it requires us to reverse the conviction.

CONCLUSION

¶59 Hollingsworth's conviction and sentence for kidnapping is affirmed.

Ruth A. Willingham · Clerk of the Court
FILED: ama

Exhibit D

Transcript of Double Jeopardy hearing referred to in Petition

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

w/o

STATE OF ARIZONA,	Court of Appeals
	Division One
Appellee,	No. 1 CA-CR 12-0684
vs.	Yavapai County
	Superior Court
CURTIS BENJAMIN HOLLINGSWORTH,	No. P1300CR2011-01229
Appellant.	**Hearing on Motions**

BEFORE THE HONORABLE TINA AINLEY

Prescott, Arizona

Tuesday, September 4, 2012

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL

PREPARED BY:

Steven A. King
Certified Court Reporter
Certification No. 50798

A P P E A R A N C E S

FOR THE APPELLEE:

YAVAPAI COUNTY ATTORNEY
By: Steven Young
Deputy County Attorney

FOR THE APPELLANT:

YAVAPAI PUBLIC DEFENDER
By: Andrew Falick
Deputy Public Defender

I N D E X

P R O C E E D I N G S

THE COURT: This is CR2001-01229, *State of Arizona vs. Curtis Benjamin Hollingsworth.*

02:16 Mr. Hollingsworth is present, in custody, with his attorney, Mr. Falick; State is present, represented through Mr. Young. This is the time set for a hearing on motions.

We have a State's Motion to Introduce the Identi-
02:17 fication of the Shirt; Defendant's Motion to Dismiss the Case, With Prejudice, for Double Jeopardy and Prosecutorial Misconduct and Due Process Violation; Defendant's Motion to Dismiss the Case for Vindictive Prosecution; Defendant's Motion to Preclude State from Introducing Any
02:17 New Evidence and Statements at Retrial; State's Motion to Quash Subpoena --

And I believe you had a chance to respond to that, or did you, Mr. Falick?

MR. FALICK: To quash the subpoena, Your Honor?
02:17 I did, Your Honor. I was in trial last week. We got a motion into you August 31st. I put it under your door right at 4:45 p.m., Your Honor, and got it delivered to the -- hand-delivered it to the prosecutor just a few minutes after that, Your Honor.

02:17 THE COURT: Seems to me it would be appropriate

to proceed on that first so that counsel have some idea of who they want to call or how they want to proceed on the remaining motions.

Mr. Young?

02:18 MR. YOUNG: Judge, I also filed a Request to Determine Admissibility of Statements, and I'm prepared to proceed with the voluntariness hearing this afternoon.

THE COURT: All right.

MR. FALICK: And, Judge, did you get my Response 02:18 to the Preclusion of Any New Evidence that was not used in the first trial?

THE COURT: Well, there was a motion with regard to that, so I would assume that would also act as a response to the voluntariness, to any new statements; 02:18 they kind of go hand-in-hand.

Then, counsel, as to the pending motions that we have today, I believe the Motion to Quash would be the appropriate motion to proceed on, unless we have something else that we need to take up.

02:23 Mr. Young?

MR. YOUNG: No, Your Honor.

MR. FALICK: May I, Your Honor, just before I forget -- Mr. Young and I briefly talked about it -- one of the witnesses in his case, Armando Luko -- As you 02:23 recall, he owns CU Pizza -- the pizza parlor has closed,

Your Honor. We are trying to locate him; however, a subpoena has not been served because the State's not exactly sure where he is. We believe we might know, and we have a subpoena out to him with the Yavapai County Sheriff.

02:24 Mr. Young has indicated to me if we cannot find him by the time of trial, he does not have any objection to that -- to his testimony coming in from the former testimony.

MR. YOUNG: That's correct.

02:24 THE COURT: I'll note that, then, if it becomes an issue.

Was there anything that you wanted to add to your motion, Mr. Young?

This is your Motion to Quash.

02:24 MR. YOUNG: Judge, I've read the response of Mr. Falick. I believe A.R.S. Section 13-4430 prohibits the Crime Victim Advocate from testifying. The victim has not issued the waiver contemplated by the statute.

And I'll leave it to your discretion. If you

02:25 feel that there is a compelling need, Judge, I'm prepared to testify.

THE COURT: Mr. Falick, was there anything you wanted to add to your response?

MR. FALICK: Judge, as we've discussed, we think

02:25 there is a need for Mr. Young to testify. You told me

last Monday that that's not going to happen, but as you could read in our motion, we think there is a material need under circumstances not in a trial setting, Your Honor, but under circumstances like this. I'd like to compare it to a post-conviction relief proceeding, Your Honor; sometimes counsel has to get up and testify.

Mr. Young has written in his response that this was a mistake, and the only way we can figure out if this was a mistake is if he's called to testify.

If you're not going to let him testify, Your Honor, I'm not going to waste the Court's time. I'll just make an offer of proof right now about some questions that I think need to be asked of him to prove to you that he needs to testify to answer these.

May I ask them, Your Honor?

THE COURT: If you have some questions that you think would show materiality, I think should you put them on the record, Mr. Falick.

MR. FALICK: Thank you, Your Honor.

Your Honor, as I said, Mr. Young is saying this is simply a mistake. And the reason why it's materially -- it's important to put him on the stand, Your Honor, is outlined in the *Pool* case.

Judge, any prosecutor in the same position as Mr. Young -- depending on the different facts, same facts,

whatever -- can just simply say it's a mistake. When reading *Pool*, when you take, you know, everything as a whole, that's what amounts to intentional conduct and what the prosecutor knows to be improper and prejudicial, and which he pursues, for any improper purpose, with indifference to the significant resulting danger of a mistrial, or reversal.

02:27

And I would like to say, Judge, I do not believe the first prong and the third prong of *Pool* are an issue here. You granted a mistrial due to the actions of the Prosecutor's Office. And you have seen from our motions, the transcripts, from everything that was said, you did not think that a bell could be un-rung, and a mistrial was granted for that reason, the testimony of Ms. Anderson saying that she could identify Mr. Hollingsworth as her alleged attacker.

02:27

02:27

So I don't think the issue here, Judge, is the first prong or the third prong; I think what Mr. Young and I are battling over right now is the second prong of *Pool*, which I just read.

02:28

Now Mr. Young is saying that this was a mistake, and I think some of the questions that I need to ask him are:

What is Mr. Young's training and experience? He has been a prosecutor for over ten years now; he is a

02:28

supervisor in the office.

What is his training and experience when going into trial?

How did Mr. Young receive all this training and experience over the years that he's been practicing as a prosecutor?

Does Mr. Young know to read police reports before going into trial?

Because, Judge, every police report that we were given, every piece of disclosure and discovery that we were given by the State was that Ms. Anderson could not identify her attacker; she could not see his face. She claimed she could see that his shirt was yellow or cream-colored and had dark-blue vertical stripes and -- and was able to get a license plate number, but she could not see the face of her alleged attacker; and in trial, she identified Mr. Hollingsworth as her alleged attacker.

Does Mr. Young know to listen to audiotapes before going into trial?

Every audiotape that we've received, Your Honor, an audiotape of the interview with Miss Anderson, Sadie Anderson, the victim in this case, shows that she cannot identify her attacker. She said it was pitch-black back there, and she could not see his face.

What has Mr. Young learned from his supervisors

regarding trial preparation?

Have his supervisors discussed with him that it's necessary to read police reports before going to trial?

Have his supervisors discussed with him that it's necessary to listen to audiotapes before he goes to trial?

What has Mr. Young learned and discussed with his supervisors regarding discovery?

Has Mr. Young learned from his supervisors that he must disclose material information to a defendant if he's going to use it against him at trial?

What has Mr. Young learned, or received as training, that he must disclose to a defendant if that disclosure or discovery is exculpatory?

Did Mr. Young learn from his supervisors that not disclosing material evidence could cause a mistrial?

Did Mr. Young learn from his supervisors that not disclosing exculpatory evidence can cause a mistrial?

Did Mr. Young know that not disclosing material evidence can cause a mistrial?

Did Mr. Young know, from his years of experience, that not disclosing material evidence and/or exculpatory evidence can cause a mistrial?

Did Mr. Young know or learn from his supervisors and training that showing a tainted and unduly-suggestive photograph to a witness regarding identification can

cause a mistrial?

Did Mr. Young know, even without any supervision, that showing a tainted or unduly-suggestive photograph could -- to a witness could cause a mistrial?

02:31 Does Mr. Young -- Has Mr. Young ever talked with his supervisors or had training regarding a *Dessureault* hearing?

Did Mr. Young know what *State v. Dessureault* said before this trial?

02:31 Your Honor, I would like to ask Mr. Young what he learned from his supervisors, Your Honor.

Judge, I don't mean to put you on the spot, but you were his supervisor. I would like to know -- ask Mr. Young what he learned, talking with you, when you

02:32 were his supervisor for years. Like I said, I don't want to put you on the spot, Your Honor; however, the only way I can get this is by talking with him.

I would assume, if I asked Mr. Young these questions, "What did your supervisors tell you regarding

02:32 this?" he would have answered, "Yes, I knew what they were; I knew they could cause a mistrial. I knew that was improper."

Did Mr. Young know, from learning from his supervisors, that not disclosing information when he had

02:32 plenty of time to do so could be considered hiding

evidence, Your Honor, and improper?

As you know, Your Honor, I'd like to put on the record that, according to Mr. Young, this happened -- he met with Ms. Anderson, I believe the motion said, on June 21st, 2012, when the picture was shown. I would like to ask him --

Your Honor, he spoke with me and Mr. Yslas on June 22nd when I was at APDA when we interviewed Detective Logan Moody over the phone, and this was never said to me. I think we have to ask him why this was not said to the Court or said to the defendant at the pretrial-slash-evidentiary hearings that we had on June 26th. Trial started June 27th, Your Honor. Why this was never said to us, Your Honor? Why this was never brought up?

And we could have dealt with this before and not even been here, Your Honor, and my client would not be sitting in here for an extra 60 days in custody.

I would like to know, Your Honor, after speaking to Mr. Young, why didn't he lay any foundation for this, Your Honor.

Your Honor, at trial, all that was said was -- And you could look at the transcripts on Day 2, June 28th, when he asked Ms. Anderson:

"Do you recognize my client -- Can you identify who your alleged attacker is?" along those lines.

And she said -- She pointed to my client and said:

"Yes. He's sitting right over there," Your Honor.

02:34 Now, Your Honor, I'd like to look at the totality of circumstances of this situation. What a surprise that was. I thought what was going to be said from everything that was disclosed to me, "No, I can't." They might say it's him; they say that's the guy that was wearing the 02:34 shirt; they say it was the guy who was driving the car with the license plate I've described; but, "No, I can't."

Without any building of foundation, Your Honor, that was a total surprise to me, a total surprise to me.

Why didn't Mr. Young, who's an experienced trial 02:34 attorney, do it like that on the stand? Why didn't he lay foundation?

And if he did, Your Honor, I could have objected and called for a *Dessureault* hearing and gone from there. But he didn't lay foundation and surprised the Court, 02:35 which I think -- and this is a small community, and it's tough to get up here and say this, Judge -- but I think that shows that there was a desire to hide that evidence, Your Honor.

I mean, "Can you identify him?"

02:35 "Yes."

Whoa. Mr. Young knew, from everything that had been disclosed, that that was not the case, Your Honor.

I would also like to ask Mr. Young --

Now remember, Judge, this is an objective test under *Pool*. Even if he says -- Even if Mr. Young says, "Yes, that was a mistake. Yes, it was negligence," should have he known? Should have he known?

I would like to ask Mr. Young, as a supervisor, whether -- Does he teach and train less-experienced attorneys on these matters?

Does he teach them proper trial preparation?

Does he teach them that they need to read police reports before they go into a trial?

Does he teach them they need to listen to the audiotapes before they go into trial, along those lines, look at pictures, listen to videos?

Does he teach them to disclose exculpatory evidence?

Does he teach these younger attorneys you need to disclose material evidence that you plan on using against the defendant at trial?

I mean, Judge, are you willing to make all this a part of the record? What I just asked, those questions, I believe that you have acknowledge a duty to the small community that those answers would be:

Yes, I know what those are.

Yes, that is hiding evidence.

No, I do train my attorneys. They have to do proper trial prep; they have to disclose information; they have to disclose information right away, once they know.

02:37

And I'm unable to ask him, Judge. I am not able to ask him what he learned from his supervisors to get to this point.

What his supervisors -- At the position he's in right now, what did his supervisors expect of him?

02:37

What did he need to know to be a Supervisor Level 4 Attorney in that office, Your Honor?

And I think that record needs to be made for an appeal, for a proper appeal or a special action, to show that my client should not be in this predicament, Your Honor; he should not have to go through another trial because what Mr. Young did or didn't do after a jury was picked, five to six days of deliberation [sic] and two hours before a jury's going to be called in for closing argument, a mistrial is declared because of these actions.

02:37

02:38

I think these questions are pertinent; I think these questions are relevant; I think they are material; and I think they're needed, Your Honor.

Thank you

THE COURT: Anything additional, Mr. Young?

02:38

MR. YOUNG: Judge, I'd rather testify than read inaccuracies in tomorrow's newspaper and to answer some of the innuendos of Mr. Falick.

THE COURT: At this point, after hearing the arguments, now I'm thinking that I may have taken this motion prematurely in some respects, because I think an issue of whether Mr. Young's testimony is compelling in some ways depends on what other kind of evidence you plan to admit, Mr. Falick, or other witnesses you plan to call in support of your motion to dismiss.

And so it may be that I hear from them and I hear the procedures and objectively I can make the call. And I don't find those questions to be necessarily compelling as I hear them right now, but it could be depending on the testimony of whoever else you plan to call for your motion to dismiss, but I may find those answers compelling.

This at this point, I would say, tentatively, I don't, but, again, depending on what the other evidence may be, that may make his evidence more compelling.

So at this point I'm not going to -- I'm going to hold in abeyance the Motion to Quash the Subpoena, because I do think I need to hear --

Again, it's an objective standard. It may be that I can make those objective findings without Mr. Young's testimony and that his testimony is not

compelling. At this point, I'm not finding that it is compelling, but, again, it may be, based on testimony of what other witnesses you call, that somehow it does become an issue and it does become more compelling.

02:40 So at this point I'm going to hold that motion in abeyance. When I thought it was something that we could probably resolve quickly, I'm thinking now that it really is a little more dependent on what else I hear in regards to the motion.

02:40 MR. FALICK: And, Judge, part of that motion, too -- I just sat down in case Mr. Young wanted to respond to that particular part, because I kind of got a little bit longwinded there -- when it comes to the testimony of Judy Fagelman, I don't know -- like you said, I don't know if 02:40 she'll be needed.

However, the statute Mr. Young cited to the Court was not in force when this trial happened; it just recently went in force, I believe, a week or two before this. I didn't even know it was in force until Mr. Young 02:40 sent me that statute.

However, Your Honor, I'd like to point out that at the trial, when we were discussing this *Desserault* hearing and I asked to call Mr. Young to the stand and you didn't let me, you, yourself, asked me if I was going 02:41 to call Judy Fagelman to the stand. I did not subpoena

her for that hearing, Your Honor.

However, what I'm trying to say is: If it was fine then, why isn't it fine now, especially when that statute was not in effect then, but I guess it is now?

02:41 THE COURT: Well, I'll not making any ruling with regard to Ms. Fagelman or the victim; my only ruling right now is with regard to Mr. Young.

MR. YOUNG: I'm sorry, I misunderstood, Your Honor. It was part of the Motion to Quash, was for

02:41 Ms. Fagelman to be called.

THE COURT: As to that, Mr. Young, did you have anything additional?

MR. YOUNG: No, Your Honor.

THE COURT: Mr. Falick, anything further in

02:41 regard to Ms. Fagelman, other than what you just stated?

MR. YOUNG: No, Your Honor. So if you're not going to make a ruling on that, then --

THE COURT: Let's set out --

As to the Motion to Dismiss, who did you plan

02:41 to call, Mr. Falick?

It's your motion. Tell me who it is.

MR. YOUNG: I planned on just calling Mr. Young, Your Honor, who at this time you're not going to let me call, and Ms. Anderson.

02:42 THE COURT: Why don't we proceed with regards to

Ms. Anderson, then, because I don't find a basis to quash a subpoena in her regard; I do find her testimony would be appropriate, and if you have a subpoena for her, you may call her.

02:42 MR. YOUNG: She is here, Your Honor.

THE COURT: Then you may proceed, Mr. Falick.

MR. FALICK: We call Ms. Anderson.

THE COURT: Come forward, Ms. Anderson, and be sworn.

02:42

SADIE ANDERSON,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

02:43 THE COURT: Mr. Falick, when you're ready.

MR. FALICK: Thank you, Your Honor.

And, Your Honor, if we may invoke the Rule. I don't know if Judy Fagelman will be testifying, but I did tell Mr. Young she is, and I guess he has asked that -- 02:43 and the victim has requested that her mother be allowed to be present. I don't have a problem with that. I did not plan to call her, but Miss Fagelman technically could be a witness here, Your Honor.

THE COURT: That's a possibility.

02:43 Ms. Fagelman, since the mother is here as a --

in a supportive role, I think to keep things clear I would ask that you step out, and I would invoke the Rule.

Mr. Young, was there anything you wanted to state on the record in regards to that?

02:43 MR. YOUNG: No, Your Honor.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. FALICK:

02:44 Q. Ms. Anderson, has the State advised you how to testify today?

A. No.

Q. State hasn't told you?

A. Huh-uh.

02:44 Q. Let's just talk about the night of the alleged incident, December 4th, 2011; okay?

A. Okay.

Q. December 4th is the night that this alleged incident took place; correct?

02:44 A. Correct.

Q. You were truthful with law enforcement officers that night?

A. Yes, I was.

Q. You were truthful when you told the police it

02:44 was very dark that evening?

A. Yes.

Q. You were truthful when you told law enforcement you did not see the face of your alleged attacker that evening?

02:44 A. Correct.

Q. Let's go to June 28th, 2012; okay?

A. Yes.

Q. You remember that day?

A. Um.

02:44 Q. Probably not. That's the day you testified in this trial.

A. Okay.

Q. Does that ring a bell?

A. Yes.

02:45 Q. You testified truthfully that day?

A. Yes.

Q. You testified you couldn't see your alleged attacker's face; is that correct?

A. Correct.

02:45 Q. So my question to you is: If you could not see your alleged attacker's face, how could you identify Curtis Hollingsworth?

A. Because the night that the officers came to my house, when I told them the -- his license plate number, 02:45 over the walkie they said, "C. Hollingsworth", and they

said "Level 3 sex offender"; and the next day I Googled him, and he was, like, the third person on Google.

Q. But you couldn't see his face.

A. Correct.

02:45 Q. So you identified him from a picture you found on the internet?

A. And by the name that the offices said over the walkie.

Q. But you did not identify him by you seeing him.

02:45 A. No.

Q. You met with Mr. Young before this trial; correct?

A. Correct.

Q. When did you meet with Mr. Young?

02:46 A. I don't remember.

Q. About a month before, week before?

A. I think sometime in October -- I mean -- not October. Sorry.

I don't remember.

02:46 Q. Would seeing the transcript maybe refresh your recollection?

A. I guess. I don't remember the first time.

Q. You met more than once?

A. Well, we talked before that, before the trial.

02:46 Is that what you're talking about?

Q. Yes.
A. We talked before the trial.
Q. How many times?
A. I don't remember.
02:46 Q. More than once?
A. Maybe twice.
Q. What was your discussion with him?
A. We just talked about what I said and just, like -- like, he had me identify, like, the roads I went on, 02:46 and that's about it.
Q. And what do you mean, you just talked about what you said?
What you said to police officers?
A. Yeah. We just went over that and then, like, 02:47 that map.
Q. So Mr. Young knew that you couldn't see the face of your alleged attacker.
A. Yes.
Q. Did Mr. Young show you a picture of 02:47 Mr. Hollingsworth?
A. Yes.
Q. What did he say when he showed you that picture?
A. "Is this the shirt?"
Q. He didn't say, "Is this the face?"
02:47 A. No.

Q. Did you ever say to him, "I would never forget a face?"

A. I don't remember.

Q. When did you tell Mr. Young that you saw Mr. Hollingsworth's face on the internet?

02:47

A. After the mistrial.

Q. Did he ever ask you before if you'd ever seen his face?

A. I don't remember.

02:47

Q. Did you ever tell him before that you'd seen his face in the newspaper?

A. Yes.

Q. You told him before the first trial you had?

A. Oh, no.

02:48

Q. Did he ever ask you?

A. I don't remember.

Q. And you don't remember -- You don't know if you ever told Mr. Young previously you would not forget your attacker's face?

02:48

A. I don't remember.

MR. FALICK: I have no further questions, Your Honor.

THE COURT: Any cross, Mr. Young?

MR. YOUNG: Yes, Your Honor.

02:48

CROSS EXAMINATION

BY MR. YOUNG:

Q. Sadie, we met in person before the trial; is that correct?

02:48 A. Uh-huh. Yes.

Q. And we met two times in person before the trial.

A. I think so.

Q. If I was to tell you we met on June 12th, do you have any reason to disagree with me?

02:48 A. No.

Q. Do you recall, when we met that first time on June 12th, that I gave you a transcript?

A. Yes.

Q. And I asked to you take that home and read

02:49 through that transcript?

A. Yes.

Q. Do you recall if that was the transcript of your interview by the detective who was the second law enforcement who came to interview you?

02:49 A. I'm pretty sure it was him (pointing).

Q. If it was a transcript of your interview with Detective Surak, would that be accurate?

A. Yes.

Q. And we met again in person on June 21st; do you

02:49 remember that?

A. Yes.
Q. You indicated in questions to Mr. Falick that I showed you some photographs on that date; is that correct?
A. Yes.
02:49 Q. And I showed you a map?
A. Uh-huh.
Q. Is that "Yes"?
A. Yes.
Q. Did I also show you photographs of the neighborhood in Cordes Lakes?
02:50 A. Yes.
Q. Did I show you photographs of the vehicle that was following you on December 4th?
A. Yes.
02:50 Q. And did I simply ask you if you recognized these photographs?
A. Yes, you did.
Q. Did I simply ask you if you recognized the map?
A. Yes.
02:50 Q. Did I indicate to you that these may be exhibits that would be shown to you at trial?
A. Yes.
Q. Do you recall telling me, on June 21st, that you knew the defendant's face, and it was words to the effect
02:50 that you wouldn't forget it?

A. I don't remember.
Q. Do you remember saying something about the pockmarks on his cheeks?
A. Yes.
02:50 Q. And you told me that prior to trial on June 21st.
A. Can explain what you're trying to ask?
Q. You told me that prior to the trial beginning.
A. Oh, yes.
Q. Which indicated to me that you knew who
02:51 Mr. Hollingsworth was.
A. Yes.
MR. FALICK: Objection, Your Honor. Speculation. Move to strike.
THE COURT: Overruled.
02:51 I'll let the answer stand.
Q. BY MR. YOUNG: We met one of time after the mistrial; is that correct?
A. Yes.
Q. And that as on August 9th?
02:51 A. Yes.
Q. At that time, did you tell me for the first time that you had Googled Curtis Hollingsworth's name?
A. Yes.
Q. And you had indicated to me that the evening,
02:51 December 4th, as you testified, you heard the name of C.

Hollingsworth or Curtis Hollingsworth over the deputy's radio.

A. Yes.

Q. And as you've indicated in your testimony, you Googled it or look him up on the internet the next day.

A. Yes.

Q. And when you looked him up, you saw a photograph of Curtis Hollingsworth.

A. Yes.

Q. And you found out information such as he was a Level 3 sex offender?

A. Yes.

Q. And did you also indicate that you saw numerous newspaper articles regarding this case, and you saw his photograph in those newspaper articles?

A. Yes.

Q. And you relayed those facts to me for the first time on August 9th.

A. Yes.

MR. YOUNG: No further questions.

THE COURT: Any redirect, Mr. Falick?

MR. FALICK: Just briefly, Your Honor.

(Next page, please.)

REDIRECT EXAMINATION

BY MR. FALICK:

Q. At the trial, Miss Anderson, you were asked, if you couldn't see your attacker's face, how could you identify Curtis Hollingsworth; correct?

A. Correct.

Q. Did you mention that you noticed that he had pockmarks on his cheeks?

A. No, I did not.

Q. Did you mention that you could never forget his face?

A. I don't believe I was asked.

Q. Do you remember what your answer was?

A. No.

Q. If -- Do you remember -- You don't what you said.

If I showed you the transcript, would that refresh your recollection?

A. Yes.

Q. I want you to read page 90.

(Pause.)

A. That's what I was going to tell you.

Q. Okay. So do you remember what you said to my question:

"When you identified Mr. Hollingsworth earlier, you're not sure that that's him," what did you say?

A. I don't remember.

"They showed me the picture afterwards of the clothes.

Q. Did you also try to attempt to tell me how else you could recognize him?

A. Yes.

Q. And what was that, what did you attempt to do?

A. I was going tell you that I saw him on Google and in the newspaper.

Q. Okay. And what did I do?

A. You objected to it.

Q. Do you know know why I objected to that?

A. No.

Q. And before trial, did Mr. Young ask you:

Did you ever see his face in the newspaper?

A. I don't recall.

Q. Before trial did Mr. Young ask if you had ever done an independent search to identify Mr. Hollingsworth?

A. No.

Q. So when you said, "He showed me a picture afterwards," did that confirm that Mr. Hollingsworth was your alleged attacker?

A. What do you mean?

Q. Did that confirm that Mr. Hollingsworth was your alleged attacker?

You couldn't see his face; correct?

A. Correct.

Q. They showed you a picture of him; correct?

A. Correct.

02:56 Q. Did that confirm to you that your alleged attacker was Mr. Hollingsworth?

A. I more than likely assumed, due to the fact that when I knew the license plate number and I Googled him, he was the only person in the vehicle with that shirt on. 02:56 So that's what made me think that it was him.

Q. When they showed you that picture, you assumed that made it him?

A. Yes.

MR. FALICK: I have no further questions, Your 02:57 Honor.

THE COURT: Thank you.

You may step down.

THE WITNESS: Thank you.

THE COURT: Did you have additional witnesses, 02:57 Mr. Falick?

MR. FALICK: Your Honor, I wanted to call Mr. Young.

And, Judge, if you are going to permit me to call Mr. Young, I would like to say there's not a lawyer here 02:57 on his side to defend him, and I don't think that's right.

MR. YOUNG: I don't need a lawyer; I can defend myself. It's just like a pro-per proceeding.

THE COURT: I'm not seeing, from the victim's testimony, anything that's compelling me or providing a basis for compelling Mr. Young to testify, Mr. Falick. I'm not seeing anything that she testified to that was contrary to Mr. Young's questions or -- and he got to cross-examine her, lead those questions; I'm not hearing that she said anything contrary to what he led her to.

So I'm going to grant the Motion to Quash the Subpoena as to him.

Did you have any additional witnesses you wish to call?

MR. FALICK: No, Your Honor. I don't have any.

THE COURT: All right.

Did you have any additional witnesses or evidence, Mr. Falick, regarding the Motion to Dismiss?

MR. FALICK: No, Your Honor. Mr. Young was the key to my witnesses here, and since I'm precluded from doing that, no, Your Honor.

THE COURT: Mr. Young, did you have any additional witnesses you wanted to call in support of the response to the Motion to Dismiss?

MR. YOUNG: Judge, I'll testify.

THE COURT: All right. Come forward and be

sworn.

STEVEN A. YOUNG,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MR. FALICK: And, Judge, before I ask Mr. Young questions, I really do think it's fair if he as an attorney down here from his office, or any office.

02:59 THE COURT: It's not necessary, Mr. Falick. He can testify, then you can cross-examine him. He can just make statements; we don't have to do the question-and-answer format.

MR. FALICK: Thank you, Judge.

02:59 THE COURT: And, Mr. Young, why don't you go ahead and tell the Court what you'd like to tell the Court, and then Mr. Falick may cross-examine you.

MR. YOUNG: Yes, Your Honor.

02:59 **DIRECT TESTIMONY**

BY MR. YOUNG:

Judge, I met with Sadie Anderson on June 12th, 2012. At that time, I did give her a transcript that was disclosed to me by Mr. Falick on or about June 1st. That 02:59 was a transcript that his office produced regarding her

interview with Detective Surak.

I asked Ms. Anderson to review that transcript.

I did reiterate to her to tell the truth to the best of her recollection, and I said that to her on a number of occasion on June 12th.

I don't recall going into specifics regarding her expected testimony, but I believe I indicated to Ms. Anderson that we would meet again, prior to the trial commencing, and go into a little further detail.

I did meet --

And Ms. Fagelman was present with me when I met with Ms. Anderson on June 12th.

I met with Ms. Anderson again on June 21st, 2012, and at that time I had compiled the exhibits that I was going to use at trial. I wanted to make sure that Miss Anderson was familiar with the exhibits, that they may come up regarding her testimony, and I wanted to make sure that she could recognize the exhibits. We talked in generalities.

I did again reiterate to Ms. Anderson on several occasions to telling the truth, the best of what she remembered.

We went over several exhibits, including the map of Cordes Lakes; the route that she had taken; photographs of the defendant's vehicle; photographs of the neighbor-

hood, including Cordes Market, the pizza place, streets that she had indicated that she had traveled when she gave statement to the police.

Ms. Anderson, at some point during this meeting, did indicate to me that she would not forget Mr. Hollingsworth's face; indicated something about the pockmarks on his cheeks.

At that point was when I showed her a photograph of the defendant wearing the shirt that she had described to the detectives. I believe she had described that shirt to Deputy Martin, the first responder; Detective Surak, the second law enforcement responder; and they had used that description as part of their attempts to locate the perpetrator of this incident.

Obviously, it was a mistake to show Ms. Anderson the photograph of the defendant. I did not indicate to her in any way, shape or form that this was the person who had grabbed her on December 4th, 2011; I simply showed her the photograph of the defendant wearing the shirt that she had described and asked her if she recognized that photograph, and she did indicate that she did, Judge, and then of course you have the transcript for what proceeded at trial.

I met with Miss Anderson on August 9th and for the first time learned that Miss Anderson, on December

4th, had heard over the radio the name of Curtis Hollingsworth, perhaps an address for Curtis Hollingsworth.

She did indicate the next day she had Googled Curtis Hollingsworth, had found a photograph of Mr. Hollingsworth, and the fact that he was a Level 3 sex offender.

At the meeting on August 9th, Ms. Anderson also got on her phone, and I don't know what she input into her phone but it did come up with some website, and she showed me the name Curtis Hollingsworth, his photograph, and the fact that there was an indication that he was a Level 3 sex offender.

Ms. Anderson had also indicated to me on August 9th that she had seen several newspaper articles in which Mr. Hollingsworth's photograph was presented, and she indicated to me that is why she was able to identify Mr. Hollingsworth at trial as the person who grabbed her on December 4th.

I learned that for the first time on August 9th, Your Honor.

THE COURT: Anything additional?

MR. YOUNG: No, Your Honor.

THE COURT: Mr. Falick, cross examination.

(Next page, please.)

CROSS EXAMINATION

BY MR. FALICK:

Q. Thank you for taking the stand, Mr. Young.

Sir, what is your training and experience?

03:04 A. I have had several years of continuing legal education. I believe I was admitted to practice in the state of Arizona in 1995 and, of course, have met my CLE requirements for every year. I have taken additional training every year, over the mandatory minimum 15 hours 03:04 of continuing legal education. We've had in-house training at the Yavapai County Attorney's Office.

I have been a member of the Yavapai County Attorney's Office since June of 1997, so I'd numerous trainings throughout my career, both before I got to the 03:05 prosecutor's office and during my tenure there.

Q. And you are a supervisor at that office?

A. Yes.

Q. You know to read police reports before going to a trial, Mr. Young; is that correct?

03:05 A. Absolutely. I always do.

Q. And you read the police reports in this case?

A. Yes.

Q. You knew the police reports had stated that Ms. Anderson could not see my client's face; correct?

03:05 A. Yes.

Q. You also listen to audiotapes before you go into a trial, Mr. Young?

A. Yes.

Q. And you knew, from all the audio interviews, that Ms. Anderson had said that he could not see my client's face the night of the alleged incident; correct?

A. Yes. I know that those are were in the audio-tapes, or at least the audiotape of her interview with Detective Surak.

Q. Her interview. That's really the only interview --

A. Yes.

Q. -- on audio.

A. Yes.

Q. So you knew that it was too dark for her to see her alleged attacker's face.

A. I knew at the time, after reading the police reports, that she had made that statement, and I knew after reviewing the tape and the transcript you produced from her interview with Detective Surak that she had made that statement; yes.

In my defense, however, there were multiple police reports -- I believe there were 18 supplemental reports; there were numerous transcripts produced; there was numerous audiotapes.

At the time that Ms. Anderson made the statement to me, just days before the trial, that she was sure that she could recognize Curtis Hollingsworth, I made the mistake and forgot that she had given previous statements that she could not see the face on the evening of December 4th.

Q. So you're saying you didn't know all the police reports in this case?

A. I am saying I knew all the police reports, but at that moment I'd forgotten that fact; yes.

Q. Did you ever go back and check?

A. I went back after the mistrial and checked.

Q. So you didn't go into trial 100-percent prepared, then.

A. I believed I was prepared as I needed to be and could be.

Q. Why didn't you disclose to me that you had -- that she could now see her attacker's face, that she was alleging that she could see it?

A. I didn't recognize, at the moment she had made that statement, that that was an additional disclosure. Obviously, that was a mistake.

Q. At trial, when I objected that she could not see his face when you tried to get Exhibit 170 admitted into evidence, how come you didn't say, "Wow, that's right.

She couldn't see his face that night"?

A. I didn't recall that she had made that statement to Detective Surak, given her conviction that she could recognize the person who grabbed her that evening when I met with her a few days before trial started.

Q. But then I cross-examined her; correct?

A. Yes.

Q. I brought that testimony out that you just brought out -- correct? -- that she could not see his face.

A. Yes.

Q. It was dark outside.

A. Yes.

Q. You could have called for a bench trial [sic] at that moment; correct?

A. As could you.

Q. But you could have. I didn't know that you knew this information.

A. I didn't know the information of how she came to learn -- how she could identify Mr. Hollingsworth until August 9th.

Q. When I asked, "You couldn't identify your attacker because it was too dark outside," she said, "Correct," at trial; correct?

A. Yes.

Q. And you didn't call for a bench trial at that moment.

A. No. I didn't believe one was warranted. You'd crossed and her and got that piece of information to light through cross examination.

Q. And during retrial, you never brought any of this up.

A. During what?

Q. During your retrial, during your redirect of her, you never brought any of this up.

A. No. I didn't believe I needed to cover ground that you'd already effectively covered. And what I was focusing on, as far as the redirect examination, I wanted to clarify that I wasn't coaching Ms. Anderson, and I wasn't telling her how to testify, and that was the focus of what the reexamination was.

Q. Did you bring up the fact that she saw pockmarks on his face?

A. No.

Q. Do you know the case *State v. Dessureault*?

A. Yes.

Q. Do you know what a *Dessureault* hearing is?

A. Yes.

Q. So you know that showing a picture, doing a one-photo show-up, could cause a *Dessureault* hearing?

A. Yes.
Q. So you're aware of that.
A. Yes.
Q. And you didn't show any other photographs to Ms. Anderson.
A. I showed her several photographs. I showed her photographs of the vehicle --
Q. I'm sorry. You didn't show her any other photographs of Mr. Hollingsworth.
A. No. I showed her one photograph of Mr. Hollingsworth that I think was admitted at trial, and it showed him in the shirt that she had described to the other deputies.
Q. You didn't show any photographs of any other possible defendants?
A. There were no other possible defendants. This case comes down -- It's not whether it was Mr. Hollingsworth. This case comes down whether he did the conduct. There is absolutely no question, whatsoever, that the person in that vehicle was Curtis Hollingsworth. The only issue for a jury to resolve was whether he engaged in the conduct as indicated by Ms. Anderson.
Q. But that wasn't my question.
A. I think that it was your question.
Q. When you showed her a picture of Mr. Hollings-

worth on June 21st, did you show a picture of anybody else? Did you do a photo-lineup with her?

A. No, because there were no other possible or potential suspects to the conduct described by Ms. Anderson. Curtis Hollingsworth is the only one who could have done this.

Q. And you're vouching to that; correct?

A. I am just giving my testimony.

Q. You're giving your opinion.

A. Absolutely, to a certainty.

Q. You admit you didn't -- you made a mistake in this case. That's what you're saying; correct?

A. Yes.

Q. You're saying that because there was so much information in this case, you kind of got confused; correct?

A. No. I'm not saying I was confused.

Q. You were mistaken as to what her testimony should have been.

A. I was mistaken to show her the photograph of the defendant, and I was mistaken to have forgotten that fact that she had given previous statements that she couldn't see his face.

Q. Do you think that mistake calls for him to be retried?

A. Yes, because there was no intent. The case law's quite clear on that: You don't get off on a technicality.

Q. You have that 15 year' experience, 14 years' experience; correct?

03:12 A. Over 15.

Q. Over 15 years?

A. Yes.

Q. As a prosecutor?

A. Yes.

03:12 Q. Fifteen years as a prosecutor.

A. Yes.

Q. Should have you known doing a one-photo show-up could have caused a mistrial?

A. I didn't look at it as a one-photo-show-up

03:13 identification. It was a mistake to show her the photo-graph.

Again, as I have indicated in my testimony, given her confidence that she could identify Mr. Hollingsworth, that led me to mistakingly [sic] show her a photograph of

03:13 the shirt with Mr. Hollingsworth wearing it, instead of just the shirt.

Q. Should have you known that could have caused a mistrial?

A. I should have known that, but it wasn't my

03:13 intent to cause a trial.

Q. Should have you known not disclosing material evidence that you're going to use against the defendant could have caused a mistrial?

A. I do know that you need to disclose everything of materiality. I didn't recognize at the time that this was material additional disclosure.

Q. Should have you known that not disclosing exculpatory evidence could cause a mistrial?

A. There was no exculpatory evidence in this case that has not been disclosed.

MR. FALICK: Your Honor, I have no further questions.

THE COURT: Thank you.

Anything additional you wanted to add?

MR. YOUNG: Judge, I would just reiterate that there was no intent to pursue an improper identification procedure in this case, and there certainly was no intent that I would pursue such to cause a mistrial or retrial in this case.

THE COURT: Thank you.

You may step down, Mr. Young.

Mr. Falick, any additional witness?

MR. FALICK: I do not, Your Honor.

THE COURT: Did you have -- I don't believe there's any witnesses necessary for the Motion to Dismiss

case before they go into trial; it doesn't excuse one, Your Honor -- and Mr. Young should have known through all the discovery -- he even said he read the discovery -- that he should have known that he needed to disclose that information, Your Honor. He should have known doing a one-photo show-up -- step back -- not disclosing that information, Your Honor, could cause a mistrial.

I think what Mr. Young is a little confused with, just reading his writing, is -- this is an assumption by me -- is that "Did he intend to cause a mistrial?" And that's not what *Pool* says, Your Honor. I think what *Pool* says is, "with indifference to a significant resulting danger of a mistrial or reversal," Your Honor. It's indifference.

And here we have a prosecutor who never offered a formal plea on this; has said from the beginning he was going to take it to trial, Judge; who did that morning, I believe, or the morning before, offer an informal plea -- and we did a quick *Donald* hearing, Your Honor -- but who knew he was going to take this to trial; who knew June 27th was the start date; who knew all the information, everybody that was going to be called and not going to be called, Your Honor.

And the fact of the matter is, one week before trial he showed a photograph to Sadie Anderson where we

had all the information -- all the information given to me by him said she could not identify her attacker.

Now, I even had a transcription made of that interview around June 1st sent to him, which he read, Your Honor, and had her read. He brought her here to read that transcript, Your Honor. So we're assuming she read it. Or he gave it to her around that time, and then when they discussed it the second time, she should have read it Your Honor. Mr. Young read that transcript, and it said: "It was too dark back there. I could not see his face."

Now, yes, this case is volumes and volumes of paperwork, Your Honor, but that still does not excuse Mr. Young from not knowing his case and actually doing a suggestive show-up, Your Honor.

And I think where the indifference comes in here, Your Honor, is the fact that Mr. Young knows that doing a one-photo show-up can violate *Dessureault* -- He's had years of experience; he knows what a *Dessureault* hearing is; he's done *Dessureault* hearings, Your Honor -- can violate that, and, in fact, cause a mistrial, which you did grant because of that, Your Honor.

He did not disclose this to me, Your Honor. This is material evidence under 15.1(f), I believe, that he was going to use at trial and did not disclose to me,

and he should have known that that could have caused a mistrial. And not disclosing that to me, Your Honor, is -- I think shows an indifference of moving forward. It's not the intent -- Did he intend to cause a mistrial? -- it's the indifference that one has, going about their business, to cause a mistrial, Your Honor.

Due to the amount of -- Due to the knowledge that Mr. Young had in this case, Your Honor, I don't think just to say it's a mistake is warranted. I mean, this small community knows his experience. The cases he does -- I mean, he's doing *Demacher*, other capital cases and so forth -- just to say, "This was simply a mistake. I got confused on the evidence."

I think we have to look at the fact, Judge, that when it comes to due process, fundamental fairness and other issues that I brought up in my double-jeopardy claims, is that fair to him, fair to Mr. Hollingsworth?

When he comes in here for trial, Judge, especially against a guy like Mr. Young, he expects the prosecutor to know everything; he doesn't expect the prosecutor to make mistakes that put him back in this situation again.

I think, Your Honor, double jeopardy has attached here. We had a jury picked. We had almost six days of trial -- We had five complete days, almost a sixth day of trial, Your Honor, and the jury was empanelled.

I think we have prosecutorial misconduct, especially prong 1 and 3 have been met, but I think what we're missing here, Judge, is prong 2:

As on whole, did Mr. Young know this was wrong? As a whole, did Mr. Young knowledge that Miss Anderson had a claimed that she could not see his face?

Yes, he knew this. He still went forward and showed a photograph, and he still went forward and did not disclose it to me.

03:21 Now we have a mistrial, Your Honor; and now my client is facing trial again with new strategies employed by Mr. Young.

I think prosecutorial misconduct has been proved. I think the second prong of *Pool* has been proved, because it's indifference; it's an objective standard. I don't think that the fact that Mr. Young got a report confused -- which was never, ever written in his motion, Your Honor; none of that was written in his motion; nothing. All he said is it was a mistake.

He never said, "I got confused on the facts. I got confused on this. I got confused on that." This is the first time we're hearing it, Your Honor.

Double jeopardy has attached, Your Honor; there is prosecutorial misconduct.

03:22 Mr. Young went forward, should have known some

things; he went forward with indifference, Your Honor. I think this case should be dismissed with prejudice, Your Honor.

It is not fair for my client to have to go through this a second time, especially with new strategies employed by Mr. Young.

Thank you.

THE COURT: Mr. Young, anything you'd like to add to your response?

MR. YOUNG: Yes, Judge.

It's critical for this Court to consider the fact that Mr. Falick asked for the mistrial. Look at page 19 and 23 of the *Dessureault* hearing transcript. Therefore, retrial is not barred unless -- with the one very narrow exception, the defense proves the second prong of *Pool*, as Mr. Falick has indicated: Intentional conduct on my part which I knew would be improper and prejudicial -- Let's talk about that part -- and which I pursued for any improper purpose with the indifference to resulting danger of mistrial or reversal.

Regarding that first part of the second prong, Your Honor, showing that photograph, I think the evidence clearly indicates was not intentional for an improper and prejudicial purpose; it was not intentional conduct.

As Ms. Anderson testified, and my testimony, I

Due to Vindictive Prosecution; correct?

MR. FALICK: No, Your Honor.

THE COURT: And did you plan on any witnesses on your Motion to Preclude?

03:15 MR. FALICK: No, Your Honor.

THE COURT: Let's go ahead, then, and argue -- if there is any additional argument with regard to the Motion to Dismiss with regard to double jeopardy and the prosecutorial misconduct and due-process violation.

03:15 Mr. Falick, anything you wanted to add to your motion?

MR. FALICK: Your Honor, I think it says it in my motion, Your Honor, we cannot say this was just a simple mistake; it goes beyond that, Your Honor. We have

03:15 to look at the years of experience, what Mr. Young does for trial preparation and so forth.

Just to say this was a simple mistake, Your Honor, I think will just let any prosecutor get off if they do this, Your Honor. I think that's why, in *Pool*,

03:15 they mentioned the objective test, Your Honor.

I want to step back here a second, Your Honor. I will be the first to take what Mr. Young said. I think that I once told you in chambers, Your Honor, this case has more paperwork than a first-degree murder case.

03:16 However, that doesn't excuse one from not knowing their

there's absolutely no reason to dismiss this case with prejudice for double-jeopardy purposes.

Mr. Falick correctly saw an issue; he made a motion; he asked for a mistrial; a hearing was held; and you remedied that issue. No further remedy is warranted in this case, Judge.

That's what the adversarial process calls for; it doesn't call for: The State makes a mistake; Defendant, you get to go scot-free. We remedy it, and we retry it.

Retrial is not barred, because he asked for that mistrial, Judge. Mr. Falick and the defense clearly has not met their burden on this motion.

As far as the discovery violation is concerned, you have remedied that as well. You've precluded the identification made by the victim, and you've declared a mistrial.

THE COURT: Anything additional, Mr. Falick?

MR. FALICK: Judge, I would just like to say -- Let's talk about those discovery violations.

The State's saying there was a discovery violation, so -- in my motion, they're seeing this is remedied under Rule 15; however you granted a mistrial because you said the photograph that she was shown hat and what it did to the jury caused prejudice. It had nothing to do with Rule 15, Your Honor.

believe indicated, Judge, I was showing her a number of potential trial exhibits. She had indicated that she had recognized the shirt; she gave a description of the shirt; she made statements to me at that meeting days before the trial that she was sure that she would recognize has face, and I mistakenly showed her a photograph of the defendant in the shirt, which shows his face.

Judge, that was not an improper showing; it certainly was not pursued as an improper show-up contemplated by *Dessureault*. So that prong's not.

More troubling for Mr. Falack's motion is the fact that he has not proven that I pursued this for an improper purpose with indifference to a resulting danger of mistrial or reversal.

As I've indicated, there's no question that Mr. Hollingsworth had some sort of contact with Ms. Anderson. The only thing that's going to be at issue for this retrial is whether he grabbed her and tried to put her in the car. Nobody else was in that car; there's no evidence of that.

So as I argued before in the *Dessureault* hearing, Judge, the line of cases implicated by *Dessureault* is really not at issue here.

When you look at those facts, the defense clearly has not met their burden on the second prong of *Pool*, and

So what do we do now? Do we go back to trial, and we just pretend this didn't happen?

She gets up and says -- What is she going to say now? -- "I can't recognize him. I don't know him. I don't know what's going on." -- we just pretend this never happened, Your Honor, at the behest [sic] of my client, of him having to go through another trial, Your Honor?

So now Mr. Young doesn't get to ask Ms. Anderson that question, "Can you recognize my client?" because she's basically said on the stand she's never seen his face, just seen pictures on the internet and pictures that Mr. Young has shown her, Your Honor, but now Mr. Young gets to take a different trial strategy and have Sergeant Myhre do it, Your Honor.

And the whole purpose of double jeopardy, Your Honor, is not to permit a prosecutor to be able to take different avenues to get a retrial, to have a trial be a mock trial Your Honor; the purpose of it is the prosecutor gets one shot.

Now, Judge, if you look at me asking for a mistrial, what were my choices, Your Honor? I had to ask you for three things: either preclude; mistrial; or dismiss. I had to ask you for one of those things, Judge. What would any trial attorney in my position do, Your Honor?

Just because I asked for a mistrial doesn't bar

a retrial, Your Honor -- I'm sorry -- Just because I asked for a mistrial, Your Honor, doesn't mean, well, the defense asked for a mistrial, so guess what, we have to do a retrial.

03:27 You have to look at the facts, Your Honor, and go, "Is it barred because there's prosecutorial misconduct?" Your Honor.

And, "Should have Mr. Young known all of these?"

"Yes, with his experience."

03:28 "Should have Mr. Young gone into this trial more prepared?"

"Yes," he should have, Your Honor.

He does *Demacher*; he does capital cases here. That's no excuse: "I got confused by my facts."

03:28 And what's kind of funny, I keep saying, "I would never forget his shirt"; his motion says, "I would never forget his face."

The shirt, you know, Judge I'm not saying the shirt is isn't an issue, but she said she saw a yellow or

03:28 cream-colored shirt with dark vertical stripes. Mr. Young's motion is saying that she now said, "I will never forget his face," and that's what made him show the picture, Your Honor.

That is a big difference, Your Honor, a big

03:28 difference. And the question is: Should have he known?

Your Honor, objectively, just because he got some facts confused, does he have to sit here again, Judge, and go through this, especially with a new trial strategy, Your Honor?

03:29 And what I can't ask Ms. Anderson, you know, "You didn't see his face that night?" because that's important to me, Your Honor.

"No, I didn't see his face, but now I know what he looks like."

03:29 I mean, isn't that prejudicial to my client, Your Honor, that we have to move forward on that because Mr. Young didn't know his case?

Thank you.

THE COURT: Mr. Falick, the case law's pretty

03:29 clear regarding *Pool*, that you asked for the mistrial, as Mr. Young stated correctly. While that does not automatically bar a double-jeopardy claim, it does unless you prove to the Court that what was done by Mr. Young constitutes prosecutorial misconduct.

03:29 I've listened to the testimony here. And while intent has been downplayed in terms of your reading of *Pool*, I do think there's something to be said in regards to that.

If we had a situation where Mr. Young was making

03:29 a pretrial identification and saying to her, "Is this the

guy who attacked you? Is this the guy you recognize?" I think your argument would be stronger in terms of intent and indifference.

However, the testimony's been from both he and the victim that they're going through the evidence, going through the photographs: "Is this the shirt?"

"That was the shirt."

Unfortunately, it happened to have Mr. Hollingsworth's head attached to the shirt in the photograph.

While it was certainly a basis for a mistrial and there were issues with regard to *Dessureault*, I don't find, as I didn't find when you made the mistrial, that the standard of prosecutorial misconduct's been met, specifically with regard to the intent and to the indifference as to result in this case, and so I don't find that you met the second prong of *Pool*, looking at all of the facts and circumstances.

While I understand, again, that Mr. Young is experienced, he and the victim are on the same page in terms of their testimony and why this photograph was shown, which was not intended to be a one-photo lineup, but unfortunately it did turn out to be that way that in *Dessureault*.

Mistakes can made on both sides, even by experienced prosecutors. That doesn't necessarily mean it rises

to the second prong of *Pool* in this case, and I don't find that it does.

I find that the due-process violations, discovery violations, were also addressed by the mistrial, and so I don't find that double jeopardy attaches here, and your Motion to Dismiss the case with prejudice is denied.

In terms of your Vindictive Prosecution motion, was there anything that you wanted to add to that, Mr. Falick?

MR. FALICK: No, Your Honor, except that, as I put in my motion, those aggravating factors that were not filed in the first case, Your Honor, were filed in this case, Judge, and could put my client at more substantial risk, Your Honor, if he is convicted at this trial, and we believe that is vindictive; we believe it is unfair.

If you do rule against us on our Vindictive Prosecution motion, Your Honor we'd ask that the State be precluded from using that at the retrial, Your Honor.

The State did cause this, Your Honor. However you want to slice it or dice it, that is an experienced prosecutor, and it's not fair for him to have to face additional time, Your Honor.

Thank you.

THE COURT: Mr. Young, anything you'd like to add to your response?

MR. YOUNG: Judge, I find it peculiar and very interesting that Mr. Falick would say that the filing of that aggravating-circumstances allegation after the mistrial would subject Mr. Hollingsworth to additional punishment, when I attached the transcript of the *Donald* hearing done before trial, and everybody acknowledged he was looking at 10 to 35 years if he's convicted.

That wasn't changed by my filing; therefore, there's no prejudice; hence, there can be no vindictiveness; hence, it's an easy call.

MR. FALICK: May I respond?

THE COURT: You may.

MR. FALICK: That would be under the assumption that if Mr. Young had the first trial, he was not -- if Mr. Hollingsworth was not convicted, Your Honor. You gave a range.

It is not my job to correct the State on something they should file to give my client more time.

Now, under 13-701(c), Your Honor, Mr. Young did put in his motion that he did file historical prior felonies. But say if he didn't prove those, Your Honor.

If he didn't prove those at the first trial, if my client was convicted, you could have not gone higher than the presumptive. And it's not my job to say, "Hey, Mr. Young, you forgot to file this, so this is what we're

going to do."

But say if he did say, "Judge, we'll get them in right now," you could have said, "Well, here you go, Mr. Falick, they're in."

03:33 So I don't think that's fair to my client, Your Honor. If he did not prove those priors, Mr. Hollingsworth would have been looking at nothing more than the presumptive on those counts, Your Honor.

THE COURT: Well, fairness is not an issue with
03:33 regard to vindictive prosecution. It's not a due-process violation claim that you've made; you've made one of vindictive prosecution, and I don't find that burden to have been met here, Mr. Falick.

So I'm denying your Motion to Dismiss With
03:34 Prejudice Due to Vindictive Prosecution as well.

As to the Motion to Preclude the State from Introducing any New Evidence or Statements at Trial, Mr. Falick, was there anything that -- I'd like lump that in, if you will, to the Identification of the Shirt -- was
03:34 there anything that you wanted to add to either of those?

MR. FALICK: Well, first off, with the Identification of the Shirt, Mr. Young and I clarified that this morning. I thought he was going to actually bring in the shirt, Your Honor, not a photograph.

03:34 But, Your Honor, when it comes to the Admissibi-

lity of Statements, I don't think it's fair, Your Honor; I would ask for any new strategy employed by Mr. Young to be precluded, Your Honor.

I cited case law in this case. A retrial is not a mock trial for a prosecutor. He did not bring up any of this in the first trial, Your Honor, and whether you say it's mistake, negligence, whatever reason you give -- that this Court gives, Your Honor, why does Mr. Young get a second shot and change his strategy against my client, Your Honor, to convict him?

Wouldn't it be fair that we do this trial the same as we did it before, Your Honor? Why does he get to change his strategies?

I quoted some of the case laws. I think the constitution, with due process, fundamental fairness and so forth.

You know, the case law says, you know, you just -- he didn't intend to cause a mistrial. Okay, Judge, if that's the theory, but why do we give him a second and stronger shot? Do you think that was the intent if a prosecutor doesn't know his case?

THE COURT: Well, Mr. Falick, if I had made a ruling -- Certainly all my prior rulings are established, and they stand.

But Mr. Young made a decision not to pursue

statements. It wasn't my call that he not pursue statements, and I don't see why he should -- why that decision -- That was his own decision, not this Court's decision -- should change because this is a retrial. I mean, clearly, if he doesn't meet his voluntariness standard, then I'll make a ruling and we'll go on with that. But we didn't even have a voluntariness hearing.

Mr. Young, I assume, made a strategical decision for whatever reason that he didn't want to admit those statements. So there's no law on the case here; there is no prior rulings that this Court has made. And certainly I intend to conform with all my prior rulings, but that's simply not the circumstance here.

MR. YOUNG: Your Honor, I'm not talking about a motion to suppress or any prior rulings. I'm asking for fundamental fairness and due process.

Why should Mr. Young, if he didn't know his case, according to him, get a do-over, another at-bat at my client's expense?

THE COURT: It's a do-over for both sides, Mr. Falick, so I don't really see the issue.

Mr. Young, anything you wanted to add?

MR. YOUNG: Judge, I'm going to object to Mr. Falick continuously arguing that I didn't know my client. I know my case. I just want that on the record.

State versus Moody, 208 Ariz. 424, at paragraphs 24 to 27:

"At a retrial, the State is not limited to using evidence presented at the first trial."

03:37 I think that answers this issue dispositively.

THE COURT: As do I, Mr. Falick.

I understand if I had made some rulings that were preventing Mr. Young from introducing statements previously, but he had chosen, for whatever reason, not 03:37 to try that before. That decision -- He's not bound by decision in this new trial.

I don't see any due-process reasons or other reasons that really prohibit that.

Again, I may make some rulings with regards to 03:37 those statements -- and we do have a motion pending in that regard -- but I don't see him limited in regards to new evidence and statements simply because it violates due process in some way.

Clearly if it's contrary to any prior ruling 03:38 I've made, I'll certainly let you make an objection as we go through that. But if it's not contrary to any of my prior rulings, I think Mr. Young can present the evidence and establish the evidence and bring in the evidence that he thinks is necessary this time, as can you, based what 03:38 your prior knowledge of the case is.

So I'm denying your motion to preclude any new evidence and statements.

Again, should anything come up as contrary to any of my prior rulings, certainly you'll be able to object to that, Mr. Falick.

We do have a witness here for the voluntariness issue, and so maybe we should get to that, and then talk a little bit about the Identification-of-the-Shirt issue.

Or do you want to argue that at this point, Mr. Young?

MR. YOUNG: Whatever the Court's preference is.

THE COURT: Mr. Falick, any preference?

MR. FALICK: Why don't we do the voluntariness hearing, Judge. I don't think the bigger issue is the shirt, now that Mr. Young has told me it's the picture.

THE COURT: Let's go ahead with the voluntariness issue, then.

And, Mr. Young, if you have witnesses, you can go ahead and call them.

Actually, maybe this would be a good time to take a recess, and when we come back from the break, then you can call your first witness.

(Whereupon a recess was taken.)

THE COURT: Resuming with CR2001-01229, *State of Arizona vs. Curtis Benjamin Hollingsworth.*

Let the record reflect the presence of the defendant, counsel, counsel for the State.

And, Mr. Young, we were going to proceed with Sergeant Myhre?

03:54 MR. YOUNG: Yes, Your Honor.

THE COURT: Sergeant, come forward and be sworn.

CHRIS MYHRE,

03:55 having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT: When you're ready, Mr. Young.

03:55 **DIRECT EXAMINATION**

BY MR. YOUNG:

Q. Tell us your name and spell your last name.

A. My name's Chris Myhre; last name is M-y-h-r-e.

Q. How are you employed?

03:55 A. I'm a patrol sergeant with the Yavapai County Sheriff's Office.

Q. Were you employed with the sheriff's office as a patrol sergeant on December 4th, 2011?

A. Yes, I was.

03:55 Q. Were you involved in the investigation of

Curtis Hollingsworth?

A. Yes, I was.

Q. Did you proceed to Mr. Hollingsworth's residence in Spring Valley on the evening of December 4th, 2011?

03:55 A. Yes, I did.

Q. Is Mr. Hollingsworth in the courtroom?

A. He is.

Q. Can you point him out and describe what he is wearing.

03:55 A. He's sitting at the defendant's table, wearing orange inmate garb.

Q. When you contacted Mr. Hollingsworth at his residence on December 4th, 2011, did you record that contact?

A. I did.

03:56 MR. YOUNG: May I approach the witness, Your Honor?

THE COURT: You may.

Q. BY MR. YOUNG: Showing you what's been marked as Exhibit 290, can you identify what that is, Sergeant

03:56 Myhre?

A. Yes. This is a CD recording of the tape I made the evening I contacted Mr. Hollingsworth, and these are my initials and badge number on the CD.

Q. Does that indicate that you reviewed that

03:56 particular CD?

A. Yes.

Q. And is it a fair and accurate depiction of your entire contact with Mr. Hollingsworth at his residence on December 4th?

03:56 A. Yes.

MR. YOUNG: Move for the admission into evidence of Exhibit 290.

THE COURT: Any objection, Mr. Falick?

MR. FALICK: No objection.

03:57 THE COURT: Exhibit 290 is admitted.

Q. BY MR. YOUNG: Sergeant Myhre, when you went to Mr. Hollingsworth's residence and you taped that contact, were any other law enforcement officers with you?

A. Yes.

03:57 Q. How many?

A. One. Officer hike Monday with the Department of Public Safety.

Q. When you went to Mr. Hollingsworth's residence on December 4th, did you knock on his door?

03:57 A. Yes.

Q. Did Mr. Hollingsworth answer the door?

A. He did.

Q. When you in this contact with Mr. Hollingsworth, did you remain outside of his residence, or did you, at

03:57 some point, go into Mr. Hollingsworth's residence?

A. Our conversation began on the porch outside the residence and then continued inside the residence into the kind of joint area between the kitchen and the living room.

03:57 Q. During your contact with Mr. Hollingsworth at his residence, was he under arrest?

A. No.

Q. Was he detained?

A. At a point he was detained; yes.

03:58 Q. And that's indicated on the CD; is that correct?

A. Yes.

Q. And when you detained Mr. Hollingsworth, did you place him in handcuffs?

A. I did.

03:58 Q. After you placed Mr. Hollingsworth in handcuffs, eventually was he taken to the Mayer Substation of the Yavapai County Sheriff's Office?

A. Yes.

Q. Did you have further contact with Mr. Hollings-

03:58 worth at the substation?

A. Yes, I did.

Q. And was that also recorded?

A. It was.

Q. Showing you what's been marked for

03:58 identification as Exhibit 291, can you describe what that

is, Sergeant?

A. Yes. This is the recording of that particular contact at the substation; and again, it has my initials and badge number.

03:58 Q. When you were at the substation, did Mr. Hollingsworth continue to be in handcuffs?

A. Yes.

Q. Was he detained at that point?

A. Yes, he was.

03:59 Q. When you got to the substation, at some point did you advise Mr. Hollingsworth of his rights pursuant to *Miranda*?

A. I did.

Q. And is that on the tape?

03:59 A. Yes, it is.

Q. The tape, Exhibit 291, have you reviewed that?

A. Yes, I have.

Q. And is that a fair and accurate representation of your contact with Mr. Hollingsworth at the substation?

03:59 A. It is.

MR. YOUNG: Move for the admission into evidence for purposes of this hearing of Exhibit 291.

THE COURT: Any objection, Mr. Falick?

MR. FALICK: No objection.

03:59 THE COURT: Exhibit 291 is admitted for purposes

of this hearing.

Q. BY MR. YOUNG: Prior to or during any contact with Mr. Hollingsworth on December 4th, did you make any threats, promises, or coerce him in any fashion?

03:59 A. No.

Q. Was it your understanding that, at the substation, someone from Criminal Investigations was going to do a more thorough interview of Mr. Hollingsworth?

A. That was my understanding.

04:00 Q. So at the substation, you didn't do a thorough interview with Mr. Hollingsworth?

A. No, I did not.

Q. However, you did advise him of his rights pursuant to *Miranda*?

04:00 A. I did.

Q. And he indicated that he understood them and would speak with you?

A. Yes.

MR. YOUNG: No further questions of this

04:00 witness, Your Honor.

THE COURT: Cross examination, Mr. Falick?

CROSS EXAMINATION

BY MR. FALICK:

04:00 Q. Is your police report accurate in this case?

A. Yes.

MR. FALICK: I have no further questions, Your Honor.

THE COURT: Any redirect, Mr. Young?

04:00 MR. YOUNG: No, Your Honor.

THE COURT: You may step down then, Sergeant. Thank you.

May the sergeant be excused, Mr. Falick?

MR. YOUNG: Yes, Your Honor.

04:00 MR. FALICK: Yes, Your Honor.

THE COURT: Do you have any additional witnesses or evidence for the voluntariness issue, Mr. Young?

MR. YOUNG: Judge, I would like to call Detective Cline, Judge.

04:00 I remind the Court that at the *Dessureault* hearing on July 6th, I had Detective Cline testify. I introduced an exhibit, which is Exhibit 229, into evidence for purposes of that hearing; that was the interview of Mr. Hollingsworth by Detective Cline, the initial

04:01 interview.

I would like the Court to consider that interview for voluntariness purposes up to the point where Mr. Hollingsworth mentions an attorney.

THE COURT: All right. Did you need to call

04:01 the detective, then?

MR. YOUNG: I do just to recall that, Judge. There are a few additional questions I need to ask, with your permission.

THE COURT: Any objection to the Court considering Exhibit 229, which has already been admitted?

MR. FALICK: No, Your Honor. I think you could also take judicial notice of that, too, Judge.

THE COURT: Then I'll plan to do that.

And, Detective, if you'd come forward and be sworn so that Mr. Young can ask some additional questions.

MARVIN CLINE,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT: When you're ready, Mr. Young.

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Can you tell us your name, please.

A. Marvin Cline.

Q. And how are you employed?

A. I work for the Yavapai County Sheriff's Office, assigned to Criminal Investigations.

Q. Were you in Criminal Investigations on December

4th, 2011?

A. Yes.

Q. Were you involved in the investigation of Curtis Hollingsworth for events that took place on December 4th, 2011?

A. Yes, sir.

Q. Did you interview Mr. Hollingsworth on December 4th, 2011?

A. Yes.

Q. Where did that interview take place?

A. It was the Sheriff's Office Substation in Mayer.

Q. When you interviewed Mr. Hollingsworth, had he already had contact with Sergeant Myhre?

A. Yes.

Q. Were you aware that Sergeant Myhre had advised Mr. Hollingsworth of his rights pursuant to *Miranda* prior to your interview of Mr. Hollingsworth?

A. Yes. I spoke with Sergeant Myhre before.

Q. Do you recall testifying at the hearing on July 6th?

A. Yes, I do.

Q. Exhibit 229, which was accepted by the Court for the purposes of that hearing, had you had an opportunity to review that CD prior to that hearing?

A. Yes, I did.

Q. And was that a fair and accurate representation of your initial contact, your initial interview, with Mr. Hollingsworth on December 4th at the Mayer Substation?

A. Yes.

04:03 Q. Prior to or during your interview with Mr. Hollingsworth, did you make any threats, promises, or coerce him in any fashion?

A. No, sir.

MR. YOUNG: No further questions, Your Honor.

04:03 THE COURT: Any cross examination, Mr. Falick?

CROSS EXAMINATION

BY MR. FALICK:

Q. Detective Cline, is your police report in this 04:03 case accurate, sir?

A. Yes, sir.

MR. FALICK: I have no further questions, Your Honor.

THE COURT: Thank you. You may step down, 04:03 Detective.

Any additional witnesses as to the voluntariness hearing, Mr. Young?

MR. YOUNG: No, Your Honor.

THE COURT: Any witnesses you wanted to present, 04:04 Mr. Falick?

MR. FALICK: No, Your Honor.

If I may -- I told Mr. Young I'd just appreciate him setting this up -- My motion was based on until he asked for an attorney, Your Honor. I don't think I have a basis to look this Court or Mr. Young in the eye and say there's a voluntariness issue up until then, Your Honor, so we'll go from there.

THE COURT: I should review the CDs, however, but it does appear, based on what Mr. Falick has advised as well as Mr. Young, that there doesn't appear to be a voluntariness issue up until the time an attorney is mentioned. Therefore, I would preclude any statements after that, and I'll look at the CDs more and more formally make a ruling before trial begins next week.

As to the identification of the shirt, Mr. Falick, I wasn't sure what you were saying in terms of -- Have you and Mr. Young been able to --

MR. FALICK: Your Honor, I apologize to Mr. Young. I thought Mr. Young was actually going to bring the shirt in, and I had never seen the shirt or anything. So he's going to be using a photograph, and I don't think I have a leg to stand on on that.

THE COURT: Then I'll grant the State's Motion to Introduce Evidence of Identification of Shirt.

Anything else that we need to address prior to

trial next week, counsel?

MR. YOUNG: Judge, I do understand that Mr. Falick may have filed a request to stay with this Court to pursue a Special Action.

04:05 I would ask that you deny that stay, Your Honor.

I did send a case to Your Honor and a copy to Mr. Falick, obviously, and it was in response to the cases that he provided to the Court and myself which did indicate that -- in the *Felix* case, that the defense can

04:06 pursue the double-jeopardy claim on appeal, Judge.

Judge, it's my position of -- especially when one of the factors in -- the fact that trial in this case is set to begin next Wednesday, Mr. Hollingsworth clearly has an equally speedy and adequate remedy by appeal,

04:06 actually pursuing a Special Action.

Granting the stay and vacating the trial may delay this process, and the Court of Appeals may choose to decline jurisdiction.

I'm asking you to deny the stay. That's cer-

04:06 tainly without prejudice for Mr. Falick requesting the Court of Appeals to a stay prior to trial.

THE COURT: Mr. Falick, anything to add to your motion?

MR. FALICK: Your Honor, I put that motion in,

04:06 Your Honor, and I appreciate Mr. Young sending over

Felix. Nobody in my office had seen that before, Your Honor. That's good to know in case your defense attorney ever forgets to do something like that.

I think the proper remedy in this situation is, 04:07 if you read the cases involved when dealing with double jeopardy and prosecutorial misconduct and so forth, is a Special Action, Your Honor. That usually seems to be how it's handled.

I believe *Felix* didn't say you have to use the 04:07 Court of Appeals; I think it said you can do both.

Could I have a moment with my client, Your Honor? And the only reason I ask for that -- that is not, like, five minutes or anything; just a moment or two -- because he might want to just go, Your Honor. If 04:07 we're not going to be waiving that right, he might just say, "Let's just go ahead, get this trial done and move forward."

THE COURT: Well, Mr. Falick, even if you have the right to a Special Action, it's not going to affect 04:07 me in terms of a stay. I can tell you right now I'm not going to grant a stay. I am perfectly content with you filing a Special Action if you want to, and if the Court of Appeals tells me to stay this matter, I absolutely will, but given my trial calendar at this point, I think 04:08 that you do have other options, so I'm not really inclined

to give you a stay.

Again, I have no problem if you want to file something with the Court of Appeals and get that going, and if they tell me to stay the trial, I will absolutely do that, but I'm not inclined to grant one, given all the cases that I've read. So it not prejudicial to your ability to follow either or any remedy that you want, but just looking at my calendar I need to leave this trial here; I need to pursue it for next week.

04:08 And, like I said, if the Court of Appeals says, "This definitely deserves our attention for Special Action", then I absolutely will stay it if they do; but I'm not inclined to grant a stay.

MR. FALICK: Yeah, Your Honor, and -- I mean 04:08 yes, ma'am, and I don't think I would be filing one. Maybe somebody from my office will, if I can inform the Court. I just want to inform you that I won't be filing one.

THE COURT: All right. For now, I am going to 04:10 go ahead and confirm the trial date for next Wednesday the 12th at 9:00 a.m., with a pretrial conference at 8:30. Probably at 8:30 I'll give a more formal ruling on the voluntariness issue. That will give me a chance to listen to the CDs.

04:10 It doesn't sound like it's going to be much of

an issue, but I'll make a formal ruling at the pretrial conference.

If there are any other issues, we can address them then as well, and I'll also available if you need to get in sometime before trial or if the Special Action does get filed and we need to address it with the Court of Appeals.

I'll confirm the existing release conditions.

No time needs to be excluded.

04:10 Do you have anything additional, Mr. Falick?

MR. FALICK: No, Your Honor. But if we cannot find Armando Luko, we have no problem with that coming in as former testimony.

THE COURT: I have no problem with his former

04:11 testimony being admitted.

Mr. Young?

MR. YOUNG: I have not objection. I think the the rules clearly contemplate that.

THE COURT: Anything further, Mr. Young?

04:11 MR. YOUNG: No, Judge.

THE COURT: Do we need 292 to 297? Do you want me to admit them? They're attached to the motions, but do you want me to admit them?

I did read them; I did consider them.

04:11 MR. FALICK: I think, if they're part of the

motions, aren't they part of the record, then, for me? That's how I read it. I don't think we have to admit them.

THE COURT: I've go ahead and release them. It may be, as we go through the trial, that they do need to be marked and admitted again; but for now I'll release Exhibits 292 through 297.

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CERTIFICATE

STATE OF ARIZONA)
) SS:
COUNTY OF YAVAPAI)

I, **Steven A. King**, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

DATED this 19th day of November 2012.

Steven A. King
Certified Reporter
Certification No. 50798