APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR L VITASEK,

Petitioner - Appellant,

v.

DAVID SHINN and ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents - Appellees.

No. 25-3476

D.C. No. 2:21-cv-00436-MTL
District of Arizona,
Phoenix

ORDER

Before: CALLAHAN and FORREST, Circuit Judges.

This appeal is from the denial of appellant's post-judgment motions. The request for a certificate of appealability (Docket Entry No. 3) 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); *Rose v. Guyer*, 961 F.3d 1238, 1245-46 (9th Cir. 2020) (explaining that a certificate of appealability is required to appeal an order that "pertain[s] to" and is not "wholly distinct from" the district court's adjudication of the habeas petition); *Martinez v. Shinn*, 33 F.4th 1254, 1261 (9th

Cir. 2022).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arthur L Vitasek,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-00436-PHX-MTL

ORDER

Pending before the Court are Petitioner's Motion for Relief from Final Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (Doc. 111), and Motion for Leave of Court to Accept Amended Subpoena (Docs. 115, 119). The Court will deny both motions.

I. BACKGROUND

On March 14, 2023, this Court adopted Magistrate Judge John Z. Boyle's Report & Recommendation ("R&R") and dismissed Petitioner's Petition for Writ of Habeas Corpus. (Doc. 72.) Final judgment was entered that same day. (Doc. 73.) Petitioner then filed a Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e) (Doc. 82), which the Court denied (Doc. 105). On November 16, 2023, Petitioner appealed both orders to the Ninth Circuit Court of Appeals. (Doc. 106.) The Ninth Circuit ultimately denied Petitioner's request for a certificate of appealability on August 29, 2024. (Doc. 110.) Petitioner's Rule 60(b) motion followed approximately twenty days later. (Doc. 111.)

II. LEGAL STANDARD

A motion under Rule 60(b) entitles a moving party to relief from final judgment on

several grounds, including, as relevant here:

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> (4) the judgment is void;
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> . . . or
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> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

Relief will be granted under (b)(3) where a judgment is "unfairly obtained." *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987). A judgment is void under (b)(4) "only where the assertion of jurisdiction is truly unsupported" and lacks "even a colorable basis." *Fed. Trade Comm'n v. Hewitt*, 68 F.4th 461, 466 (9th Cir. 2023) (internal citation and quotation marks omitted). The Ninth Circuit "use[s] Rule 60(b)(6) sparingly as an equitable remedy to prevent manifest injustice." *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (internal quotation marks and citation omitted). Therefore, "[i]n order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal." *Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012) (internal quotation marks and citation omitted). "Such [extraordinary] circumstances will rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

III. DISCUSSION

Petitioner urges Rule 60(b) relief is warranted for three reasons, arguing: (1) the Magistrate Judge lost jurisdiction to issue an R&R and this Court lost jurisdiction to enter final judgment "once the Magistrate [] recognized an arguable issue existed;" (2) the State Courts did not have jurisdiction to conduct a trial on an indictment based on statutes that were determined to be unconstitutional; and (3) the opposing party committed fraud by withholding exculpatory records. (Doc. 111.)

A. Federal Jurisdiction

In his first argument, Petitioner contends this Court lost jurisdiction once the

Magistrate Judge "recognized an arguable issue existed," and therefore, the Court "was obligated by clearly established federal law to grant the writ unless the State Court reinstated the petitioner[']s appeal," and "appoint new counsel." (Doc. 111 at 5.)

Petitioner misunderstands the Magistrate Judge's recommendation. Quoted in its entirety, the Magistrate Judge explained:

> The Court considered but rejected recommending a certificate of appealability for Petitioner's claim in Ground Six. The Court recognizes there is weight to both sides of the argument on this issue and whether Petitioner has made a substantial showing of the denial of a constitutional right.
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> . . . .
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> Thus, because fairminded jurists may disagree on the correctness of the state court's decision on the issues raised by Petitioner in Ground Six, it is beyond debate that Petitioner is not entitled to habeas relief on those claims here. Accordingly, the Court must recommend that a certificate of appealability be denied.

(Doc. 42 at 52-53.) And in his assessment of Ground Six, the Magistrate Judge concluded that Petitioner failed to show the state court's ruling was unreasonable. (*Id.* at 25-28.)

The Court does not fault Petitioner for his confusion, as the rules and legal standards in habeas proceedings are certainly opaque. When it comes to the merits of a habeas claim under § 2254, a petitioner is entitled to habeas relief for properly exhausted claims only if the state court decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "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). And habeas relief can only be granted where a state court's determination was unreasonable and "flawed 'beyond any possibility for fairminded disagreement.'" *McGill v. Shinn*, 16 F.4th 666, 703 (9th Cir. 2021) (citation omitted). Therefore, if fairminded jurists could disagree as to the correctness of a state court's decision, then a petitioner has failed to show the state court's decision was unreasonable under § 2254. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Obtaining a certificate of appealability, however, is an entirely different matter. For

a court to issue a certificate of appealability, a petitioner need only establish a "substantial showing of the denial of a constitutional right," which is satisfied "by demonstrating that jurists of reason could disagree with the *district court's* resolution of his constitutional claims." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (emphasis added). In other words, if fairminded jurists would all agree that habeas relief is precluded, the court will decline to issue a certificate of appealability.

In this case, the Magistrate Judge found that fairminded jurists could disagree as to the correctness of the *state court* decision, and therefore, Petitioner failed to show the state court's decision was "unreasonable." (Doc. 42 at 26-28.) The Magistrate Judge then determined that fairminded jurists could *not* disagree that habeas relief is precluded as a result. (*See id.* at 53 ("[I]t is beyond debate that Petitioner is not entitled to habeas relief on those claims here.").) Reviewing the issues and Petitioner's objections *de novo*, the Court concurred with the Magistrate Judge's reasoning and ultimately declined to issue a certificate of appealability. (Doc. 72 at 32, 34.)

Contrary to Petitioner's assertions, the Magistrate Judge did not create any "arguable issue" or otherwise divest this Court of jurisdiction to adjudicate his habeas petition. Petitioner argues *Evans v. Clarke*, 868 F.2d 267 (8th Cir. 1989) and *Penson v. Ohio*, 488 U.S. 75 (1988) constitute "clearly established federal law" to require the Court to either "remand the appeal back to the state courts to properly exhaust the arguable issue, or appoint new counsel." (Doc. 111 at 5-6.) But neither case supports such a proposition. In light of the above, Petitioner has not shown the judgment is void under Rule 60(b)(4).[1]

B. Constitutionality of Arizona Statutes

Turning to Petitioner's second argument: he contends "[t]he State Courts did not have jurisdiction to conduct a trial on an indictment that was obtained with statutes that were determined to be unconstitutional then revoked." (Doc. 111 at 7.) Petitioner acknowledges that "this issue was not raised during appeal," but this Court should nonetheless consider it because it is jurisdictional, and issues going to the Court's

[1] In his reply, Petitioner clarifies that his first argument "is that the judgment is void under Rule 60(b)(4)" and that he is not seeking relief under Rule 60(b)(6). (Doc. 114 at 3.)

jurisdiction "can not be waived" and "can be raised at any time." (*Id.*) Petitioner asks the Court "to set aside the conviction and sentence" because "the indictment was obtained with an unconstitutional statute," and therefore, "no legal prosecution can be had." (*Id.* at 8.)

The United States Supreme Court has clarified that Rule 60(b) may not be used to circumvent "the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." *Gonzalez*, 545 U.S. at 531 (citing § 2244(b)(3)). Delineating between a proper Rule 60(b) motion and a disguised second or successive § 2254 petition, however, is no easy task. But the Supreme Court has provided some guidelines. Generally, "when a Rule 60(b) motion attacks . . . some defect in the integrity of the federal habeas proceedings[,]" such as "[f]raud on the federal habeas court[,]" or that the district court erred in making a procedural ruling, it is a valid Rule 60(b) motion. *Id.* at 532 nn.4-5. By contrast, "a Rule 60(b) motion is to be treated as a successive habeas petition if it: (1) 'seeks to add a new ground of relief;' or (2) 'attacks the federal court's previous resolution of a claim on the merits.'" *Williams v. Chatman*, 510 F.3d 1290, 1293-94 (11th Cir. 2007) (quoting *Gonzalez*, 545 U.S. at 532).

While disguised as a jurisdictional challenge under Rule 60(b)(4), Petitioner's argument, in substance, raises a new claim for habeas relief in a second or successive petition without adhering to the strictures of 28 U.S.C. § 2244(b).[2] To the extent Petitioner seeks relief under Rule 60(b)(4), his request is denied because the Court lacks jurisdiction to consider his new claim. *Burton v. Stewart*, 549 U.S. 147, 153 (2007) (explaining that district courts are "without jurisdiction" to consider a second or successive application where the petitioner does not "receive authorization from the Court of Appeals before filing"). And Petitioner has not shown any extraordinary circumstances exist to warrant the

[2] 28 U.S.C. § 2244(b) imposes both substantive and procedural prerequisites before a petitioner may file a second or successive petition. On a substantive level, the new claim must either rely on (1) "a new rule of constitutional law, made retroactive to cases on collateral review[,]" or (2) newly discovered facts. *Id.* § 2244(b)(2). And procedurally § 2244(b)(3) requires an applicant to "move in the appropriate court of appeals for an order authorizing the district court to consider the application" before filing the successive petition. Petitioner has not satisfied either the substantive or procedural prerequisites here.

requested relief under Rule 60(b)(6). Accordingly, Petitioner's second argument for relief from the final judgment is meritless.

C. Fraud

And finally, the Court addresses Petitioner's remaining argument that "[t]he opposing party committed fraud by withholding exculpatory records which were ordered by the Trial Court Judge to be part of the Record on Appeal." (Doc. 111 at 9.) According to Petitioner, the State "Trial Court Judge allowed the prosecutor to redact whatever she wanted" in witness police interviews, which had the effect of "manipulat[ing] the evidence to conform to what she wanted the truth to be not what actually occured [sic]." (*Id.*) Petitioner represents that the entire transcripts were to be included as part of the record on appeal, but "the opposing party purposely withheld the portions of the record on appeal that show the defendant was denied his 6th and 14th Amendment rights." (*Id.* at 10-11.) Petitioner characterizes this omission as "fraud"—presumably under Rule 60(b)(3)—and requests the Court "order the State to produce the missing court ordered records on appeal" and "review the exculpatory evidence" to determine whether a constitutional violation occurred. (*Id.* at 11.)

Again, this is a new claim for habeas relief couched in the language of Rule 60(b). Petitioner does not argue any "fraud on the habeas court" or that there was otherwise a defect in the integrity of habeas proceedings. *Gonzalez*, 545 U.S. at 532 n.5. And the Court will not permit Petitioner to circumvent AEDPA's requirements by considering his new claims in this motion. Because Petitioner has failed to show he is entitled to relief from final judgment under any of the subsections of Fed. R. Civ. P. 60(b), the Court will deny his motion (Doc. 111).

D. Motion to Approve Subpoena

Petitioner also filed a Motion for Court to Approve Petitioner's Subpoena (Doc. 115) and Amended Motion (Doc. 119).[3] The subpoena is directed to the Assistant Attorney General of the Arizona Attorney General's Office and seeks "unredacted and

[3] Petitioner amended the motion and subpoena to include the address of the recipient. (Doc. 119.)

redacted transcripts of Mesa Police interviews" that the prosecutor failed to provide during Petitioner's state court proceedings. (Doc. 115 at 2-3, 6.)

Petitioner's request is made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552a(d)(1). (*Id.* at 2.) Critically, however, FOIA does not apply to state or local agencies, including the Arizona Attorney General's Office. *See* 5 U.S.C. § 551(1) (applying to agencies defined as "each authority of the Government of the United States"); *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1372-74 (9th Cir. 1981) (refusing to apply FOIA to state agencies receiving federal funding and regulation).

And in any case, this matter is closed, and has been closed for over two years. Petitioner has not shown he is entitled to relief from final judgment under Rule 60(b), nor demonstrated good cause to warrant further discovery. *See Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (explaining that good cause for further discovery under Rule 6(a) exists where "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief") (citation omitted). Indeed, this Court has already considered and rejected Petitioner's requests for production of the transcripts on numerous occasions. (Doc. 42 at 50-51; Doc. 60 at 2-3; Doc. 72 at 30-31.) Therefore, the Court will deny Petitioner's motion (Docs. 115, 119).

IV. CONCLUSION

Accordingly,

IT IS ORDERED Petitioner's Motion for Relief from Final Judgment (Doc. 111) is denied.

IT IS FURTHER ORDERED Petitioner's Motion to Approve Subpoena (Docs. 115, 119) is denied.

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IT IS FINALLY ORDERED that to the extent Petitioner seeks a certificate of appealability to appeal this ruling, that request is also denied.

Dated this 24th day of April, 2025.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arthur L Vitasek, Petitioner, v. David Shinn, et al., Respondents.	No. CV-21-00436-PHX-MTL (JZB) REPORT & RECOMMENDATION

TO THE HONORABLE MICHAEL T. LIBURDI, UNITED STATES DISTRICT JUDGE:

Petitioner Arthur L. Vitasek has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Docs. 1, 1-1, 1-2, 1-3.)

I. Summary of Conclusion.

Petitioner was convicted at trial and sentenced on various counts involving sexual misconduct with minors. Petitioner unsuccessfully sought relief in state court. Petitioner then filed a habeas petition in this Court asserting 12 multi-faceted grounds for relief. Because each ground and subpart is either non-cognizable, procedurally defaulted, or without merit, the Court recommends the petition be dismissed with prejudice.

II. Background.

A. Conviction & Sentencing.

The Arizona Court of Appeals summarized the facts of the case as follows:[1]

[1] The Court presumes the Arizona Court of Appeals' summary of the facts is correct. 28 U.S.C. § 2254(e)(1).

Accordingly, the Court recommends that Ground Eleven be dismissed as procedurally defaulted.

L. Ground Twelve.

Petitioner claims his appellate counsel rendered ineffective assistance by filing an *Anders* brief "when numerous meritorious appellate issues existed." (Doc. 1-3 at 11; *see* Doc. 10-1, Ex. D, at 29–44.) Petitioner further claims he was denied due process because the state court "failed to appoint new counsel to represent [him] on these meritorious issues." (Doc. 1-3 at 11.) Petitioner presented and exhausted these claims in his petition for review during his PCR proceeding. (*See* Doc. 10-4, Ex. O, at 25–26.) The Arizona Court of Appeals held his claims failed "because he did not argue how he was prejudiced by counsel's ineffectiveness," noting that Petitioner "raised the issues himself in multiple supplemental briefs and presented no evidence that the outcome would have been different had counsel raised these issues." (Doc. 1-5, Ex. K, at 7.)

As previously discussed, to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and (2) "that the deficient performance prejudiced the defense," *i.e.*, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 687–90, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Petitioner is not entitled to relief on his ineffectiveness claim because he fails to show that the Arizona Court of Appeals' rejection of it was unreasonable. To the contrary, the court of appeals reasonably rejected it because Petitioner had not shown he was prejudiced by appellate counsel's decision to forego litigation of any issues on appeal. *See generally Anders*, 386 U.S. at 744 ("[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("Neither *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to

compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."). Despite alleging in his Petition that "numerous meritorious appellate issues existed," he does not identify any. Nor did the state courts find any meritorious appellate issues after review of the numerous claims Petitioner raised on direct and collateral review. And, as explained through this Report, Petitioner also fails to show any meritorious issue in the present Petition. Therefore, Petitioner's claim fails on both prongs of *Strickland* for failure to show counsel performed deficiently by failing an *Anders* brief and any prejudice resulting from that decision. *See Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012) ("It should be obvious that the failure of an attorney to raise a meritless claim is not prejudicial"); *Rupe*, 93 F.3d at 1445 ("[T]he failure to take a futile action can never be deficient performance."). Therefore, the Arizona Court of Appeals' rejection of his claim on collateral review was neither contrary to *Strickland*, or any other clearly established federal law, nor an unreasonable determination of the facts.

The due process claim of Ground Twelve is procedurally defaulted. Petitioner did not present this claim to the Arizona Court of Appeals in his direct appeal or in his petition for review (*see* doc. 10-2, Ex. E, at 3–71; doc. 10-3, Ex. F, at 2–17; doc. 10-4, Ex. O, at 3–47) and therefore it is unexhausted. *See Swoopes*, 196 F.3d at 1010. Further, it is implicitly procedurally defaulted because Ariz. R. Crim. P. 32.2(a)(3) bars Petitioner from asserting it in state court now. *See Hurles*, 752 F.3d at 780; *Cooper*, 641 F.3d at 327; *Beaty*, 303 F.3d at 987 ("If [petitioner] has any unexhausted claims, he has procedurally defaulted them, because he is now time-barred under Arizona law from going back to state court." (citing Ariz. R. Crim. P. 32.2(a))). The procedural default is not excused as Petitioner does not show cause and prejudice or a fundamental miscarriage of justice. *See Moormann*, 426 F.3d at 1058. In any event, the right to counsel stems from the Sixth Amendment, not the Fourteenth Amendment.

Accordingly, the Court recommends that Ground Twelve be dismissed.

VI. Motion for Discovery.

Petitioner has filed a motion for discovery of records from Child Protective Services. (Doc. 9.) Therein, Petitioner states that on February 3, 2011, Petitioner filed a Motion for Discovery to "obtain the CPS records for the children of Julian and Fred Moore" to "substantiate arguments within the Petitioner's motion for chastity[]." (*Id.* at 1.) Petitioner now requests this Court "order the AG's Office to turn over these CPS records so this Court can conduct its own inspection" and disclose documents to Petitioner. (*Id.* at 6.) The Motion is fully briefed. (Docs. 12, 13.) The Court will recommend Petitioner's Motion be denied.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). But, a judge may authorize discovery for "good cause." Rule 6(a), Rules Governing § 2254 Cases, 28 U.S.C. § 2254. Good cause exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief. . . ." *Bracy*, 520 U.S. at 908–09 (citation omitted).

Petitioner sought these CPS records prior to trial, and the trial court ordered the disclosure of CPS records. (Doc. 9 at 9.) It appears undisputed the CPS records were not disclosed to any party. Petitioner did not raise an issue regarding CPS records on direct appeal. (Doc. 10-3, Exs. F-H, at 3–48.) On PCR review, the trial court denied relief regarding CPS records finding "[t]here is no evidence that the undisclosed CPS records say what the defendant believes they say." (Doc. 1-4 at 30.) The Arizona Court of Appeals, on PCR review, found "the trial court [in PCR proceedings] did not abuse its discretion by denying Vitasek's motion for an in-camera inspection" of CPS records. (Doc. 10-5, Ex. Q, at 19.)

Here, the Arizona Court of Appeals ruled on the merits of Petitioner's claim regarding the victim's "chastity" and precluded the admission of other act evidence by the victims. In *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011), the Supreme Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that

adjudicated the claim on the merits." This effectively precludes federal evidentiary hearings for such claims because the evidence adduced during habeas proceedings in federal court could not be considered in evaluating whether the claim meets the requirements of § 2254(d). *See id.* at 187 n.11 ("[Petitioner] has failed to show that the [state court] unreasonably applied clearly established federal law on the record before that court, which brings our analysis to an end.") (internal citations omitted). *See also Gulbrandson v. Ryan*, 738 F.3d 976, 993–94 (9th Cir. 2013) (when a state court has denied claims on their merits, *Pinholster* precludes "further factual development of these claims" through an evidentiary hearing to determine whether Section 2254(d)(1) or (d)(2) is satisfied); *Runningeagle v. Ryan*, 686 F.3d 758, 773–74 (9th Cir. 2012) (denying the petitioner's request for discovery, because the state courts denied his claim on its merits, and thus, the *Pinholster* rule limited review under Section 2254(d)(1) to the record before the state courts).

Because the state courts denied Petitioner's claim on the merits regarding the victim's other act evidence, Petitioner's request to open discovery should be denied.[30]

VII. Motion for Evidentiary Hearing.

Petitioner has filed a motion for an evidentiary hearing. (Doc. 18.) Therein, Petitioner argues that the Court is required to conduct a hearing to resolve "factual disputes" between the parties. (Doc. 18 at 1.) The Motion is fully briefed. (*See* Docs. 19 (Response), 21 (Reply), 22 (Attachments to Reply), 23 (Additional Attachments to Reply).)

The record is sufficiently developed that an evidentiary hearing is unnecessary to resolve factual disputes alleged by Petitioner. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). Because the

[30] In Ground Nine, Petitioner alleges the prosecution committed misconduct by engaging in "discovery violations," which included doing nothing "to facilitate" obtaining CPS records and lying to the court. (Doc. 1-2 at 19.) Petitioner did not raise this specific claim of prosecutorial misconduct on direct appeal, and Petitioner fails to establish cause and prejudice to excuse the procedural default of this claim. Respondents also argue the request "should be denied because the records and any questions related to those records are not relevant to Vitasek's procedurally defaulted" claim. (Doc. 12 at 5.)

record refutes Petitioner's factual allegations, or otherwise precludes habeas relief as detailed in this report, the Court will recommend that Petitioner's Motion for an evidentiary hearing be denied.

VIII. Certificate of Appealability.

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Hab. R. 11(a). The Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003).[31]

The Court considered but rejected recommending a certificate of appealability for Petitioner's claim in Ground Six. The Court recognizes there is weight to both sides of the argument on this issue and whether Petitioner has made a substantial showing of the denial of a constitutional right. *See, e.g., Ortiz v. Yates*, 704 F.3d 1026, 1038 (9th Cir. 2012) (reversing habeas denial in non-rape-shield case where alleged threat by prosecutor to victim was unreasonably precluded). But the facts and arguments in this case confirm that fairminded jurists could disagree on the correctness of the state court's decision. *See Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (holding that relief under AEDPA is warranted only where a state court's determination is "objectively unreasonable," and not merely "incorrect or erroneous"); *McGill v. Shinn*, 16 F.4th 666, 703 (9th Cir. 2021) ("On AEDPA review, we may not grant relief unless the Arizona Supreme Court's application of federal law was flawed 'beyond any possibility for fairminded disagreement.' Even if we thought the Arizona Supreme Court's conclusion was wrong . . . we could not issue relief. Rather, we can only review the decision to determine if it is an *unreasonable* application of [the

[31] Regarding habeas relief, the standard is whether "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101.

applicable law]." (internal citation omitted)). Thus, because fairminded jurists may disagree on the correctness of the state court's decision on the issues raised by Petitioner in Ground Six, it is beyond debate that Petitioner is not entitled to habeas relief on those claims here. Accordingly, the Court must recommend that a certificate of appealability be denied. *See Miller–El*, 537 U.S. at 327.

As to all of Petitioner's remaining claims, Petitioner has also failed to make the requisite showing and the Court will recommend that a certificate of appealability be denied.

Accordingly,

IT IS RECOMMENDED that the Petition for a Writ of Habeas Corpus (docs. 1, 1-1, 1-2, 1-3) be **dismissed with prejudice.**

IT IS FURTHER RECOMMENDED that the Motion for Discovery (doc. 9) and Motion for Evidentiary Hearing (doc. 18) be **denied.**

IT IS FURTHER RECOMMENDED that a certificate of appealability be **denied** as to all of Petitioner's claims.

This 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 14 days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have 14 days within which to file a response to the objections.

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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. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). 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* Fed. R. Civ. P. 72.

Dated this 2nd day of March, 2022.

Honorable John Z. Boyle
United States Magistrate Judge

APPENDIX D

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arthur L Vitasek,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-00436-PHX-MTL

ORDER

Before the Court is Petitioner's Motion for Reconsideration of the Court's Order denying Petitioner's Rule 60(b) motion. (Docs. 121, 122.) The pending motion asks the Court to reconsider its ruling that (1) he failed to show the final judgment was void under Fed. R. Civ. P. 60(b)(4) and (2) he is not entitled to a certificate of appealability. (Doc. 122.) The Court will deny the motion.

I.

The standard of review for motions for reconsideration is set forth in Local Rule of Civil Procedure 7.2(g). Motions for reconsideration will ordinarily be denied "absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv 7.2(g)(1). "Motions for reconsideration are disfavored . . . and are not the place for parties to make new arguments not raised in their original briefs. Nor is reconsideration to be used to ask the Court to rethink what it has already thought." *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (citations omitted).

II.

As in his Rule 60(b) motion, Petitioner first argues, "[a] court's review must cease 'once' (at the moment when) the Magistrate Judge recognized Ground 6 was an arguable issue and provide the Petitioner his Constitutional Due Process right to representation[,]" as required by *Penson v. Ohio*, 488 U.S. 75 (1988). (Doc. 122 at 2.) This argument asks this Court to "rethink what it has already thought"—which is improper in a motion for reconsideration. *Motorola, Inc.*, 215 F.R.D. at 582; *see also Mogan v. Airbnb, Inc.*, No. 23-55489, 2024 WL 3738480, at *4 (9th Cir. Aug. 9, 2024) (explaining that a motion for reconsideration is improper if merely sought to relitigate the arguments earlier made). As this Court has informed Petitioner, *Penson* concerns the procedures designed to protect a defendant's right to appellate counsel where an appeal is not frivolous pursuant to *Anders v. California*, 386 U.S. 738 (1967). Specifically, the U.S. Supreme Court in *Penson* explained that when an *Anders* brief is filed, the appellate courts are to make their own independent examination of the record and appoint new counsel if the record supports "several arguable claims." 488 U.S. at 82-83.

Those circumstances are not at issue here. The Magistrate Judge did not recognize any arguable issue, and *Penson* does not support Petitioner's argument. Petitioner does not get endless opportunities to relitigate the same issues this Court has already considered and rejected. Accordingly, Petitioner fails to show reconsideration on this point is warranted.

Petitioner also requests a certificate of appealability. (Doc. 122 at 3-4.) When a Rule 60(b) motion is denied, the court may issue a certificate of appealability if the movant demonstrates that: "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion; and, (2) jurists of reason would find it debatable whether the underlying habeas corpus petition states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *see also Ciotta v. Frauenheim*, No. 17-16391, 2017 WL 4546728, at *1 (9th Cir. Sept. 7, 2017) (applying *Winkles* to a Rule 60(b) motion in a 28 U.S.C. § 2254 case).

As to the first prong, Petitioner has not demonstrated it is reasonably debatable that

this Court abused its discretion in denying the Rule 60(b) motion. Reasonable jurists would agree that Petitioner failed to show the judgment was void for lack of jurisdiction under Rule 60(b)(4) for the reasons stated above. Further, jurists of reason would not find it debatable that the Court was without jurisdiction to consider Petitioner's second or successive claims.* And as to the second requirement, this Court has already determined that jurists of reason would not debate whether Petitioner's § 2254 petition states a claim for the substantial denial of a constitutional right when it dismissed the habeas petition. (*See* Doc. 42 at 52-53; Doc. 72 at 34.) Indeed, the Ninth Circuit similarly agreed when it declined to issue a certificate of appealability after Petitioner appealed the Court's order dismissing his petition. (Doc. 110.)

None of the arguments in Petitioner's Rule 60(b) motion or the pending motion for reconsideration negate these findings or otherwise suggest "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Accordingly, Petitioner's request for a certificate of appealability is denied.

IT IS THEREFORE ORDERED that Petitioner's Motion for Reconsideration (Doc. 122) is denied.

Dated this 23rd day of May, 2025.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

* Reasonable jurists would all agree that several arguments in Petitioner's Rule 60(b) motion were disguised attempts to raise new claims in a second or successive petition. As explained in the Court's order denying the Rule 60(b) motion, Petitioner has not moved in the appropriate court of appeals for authorization to file the successive petition. Notably, Petitioner does not challenge the Court's reasoning in the instant motion for reconsideration.

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