



1 Fine's recommendation to deny relief on grounds one and three and her finding that  
2 Petitioner procedurally defaulted his claims without excuse. Doc. 20. The Court "may  
3 accept, reject, or modify, in whole or in part, the findings or recommendations made by the  
4 magistrate judge." 28 U.S.C. § 636(b)(1).

## 5 **II. Discussion.**

### 6 **1. Objection Regarding Grounds One and Three.**

7 In his objection, Petitioner alleges defects in his state court proceedings and restates  
8 the ineffective assistance of counsel ("IAC") claims he asserted in his habeas petition. He  
9 argues that his counsel was ineffective for failing to overcome the trial court's evidentiary  
10 rulings and for failing to challenge Arizona's child molestation statute as unconstitutional.  
11 Docs. 20 at 5-6; 20-1 at 4-6. Although not entirely clear, the Court will construe  
12 Petitioner's arguments as objections to Judge Fine's recommendation to deny relief on  
13 grounds one and three. Doc. 19 at 13, 17. The Court will review these recommendations  
14 *de novo*. See *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

15 Petitioner first argues that his trial counsel failed to overcome the trial court's  
16 evidentiary rulings regarding certain evidence. Doc. 20 at 5-6. This evidence was  
17 presented in ground one of his petition, and includes taped conversations that D.W., the  
18 victim in this case, had with an adult male named Brian Mick; D.W.'s Child Protective  
19 Services reports; and D.W.'s psychological reports from Kansas. *Id.* at 1-8; Doc. 19 at 6-  
20 7. Petitioner argues that Judge Fine "overlooked" his counsel's failure to get this evidence  
21 introduced as part of the "many errors which undermined the proper functioning of the  
22 trial." Doc. 20 at 1.

23 Based upon a review of the record, including Petitioner's pleadings on direct appeal  
24 (Doc. 15-11 at 132, 166), his first post-conviction relief petition (Doc. 15-5 at 62), his  
25 petition for review from the denial of post-conviction relief (Doc. 15-12 at 2), the Arizona  
26 Court of Appeals' memorandum decisions denying relief in both state-court proceedings  
27 (Doc. 15-11 at 183), and the Arizona Supreme Court's order summarily denying review on  
28 direct appeal (Doc. 15-11 at 181), the Court finds that Petitioner never fairly presented this

1 IAC argument in state court. Although Petitioner challenged the trial court’s rulings on  
2 the evidence at issue here, he did not argue that his counsel was ineffective in failing to  
3 overcome those rulings. *See, e.g.*, Doc. 15-11 at 135, 168; Doc. 15-12 at 3; *see Baldwin v.*  
4 *Reese*, 541 U.S. 27, 32-33 (2004) (holding that to be fairly presented, a claim must include  
5 a statement of the operative facts and the specific federal legal theory). Accordingly, these  
6 claims were never properly presented in state court.

7 Petitioner also contends that his counsel was ineffective for failing to challenge  
8 Arizona’s child molestation statute as unconstitutional. Doc. 21-1 at 6. But Petitioner  
9 failed to exhaust this claim in state court. Doc. 19 at 17. Although he did raise the claim  
10 in a successive post-conviction relief petition (Doc. 15-12 at 44-49, 58-63), he withdrew  
11 the petition and moved instead to proceed with a habeas petition before this Court (*Id.*  
12 at 77). This claim is thus procedurally defaulted.<sup>1</sup>

13 Arizona’s procedural rules bar review of claims not raised on direct appeal or in  
14 prior Rule 32 post-conviction proceedings. *See, e.g., Stewart v. Smith*, 536 U.S. 856, 860  
15 (2002). Because a federal court cannot grant habeas relief on claims that a state prisoner  
16 never properly presented to the state courts, the Court will accept Judge Fine’s  
17 recommendation and will reject Petitioner’s grounds one and three arguments as  
18 procedurally defaulted. *See* 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry*, 513  
19 U.S. 364, 365 (1995); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

## 20 **2. Argument Regarding Denial of Funds for a Defense Expert.**

21 Petitioner also argues that his due process rights were violated because he was  
22 denied funds for an expert witness to question D.W. and refute the state’s expert. Doc. 20  
23 at 12. But Plaintiff never requested the appointment of an expert in the trial court (Doc. 15-  
24 1 at 4-14), nor did he raise the issue on either direct appeal or his post-conviction relief  
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27 <sup>1</sup> Even if Petitioner had raised this argument in state court, it would fail here because  
28 the Ninth Circuit Court of Appeals vacated the case on which he bases his argument. *See*  
*May v. Ryan*, 766 Fed. Appx. 505, 506-07 (9th Cir. 2019) (“Because we do not reach the  
constitutionality of the Arizona child molestation statute, we vacate the district court’s  
judgment in that respect.”).

1 proceedings (Docs. 15-11 at 132, 166; 15-5 at 62; 15-12 at 2). Because Petitioner failed to  
2 exhaust this claim in state court, it is procedurally defaulted.

3 **3. Objection Regarding the Cause and Prejudice Determination.**

4 Petitioner also generally objects to Judge Fine’s finding that he failed to establish  
5 either cause or prejudice for his defaults. Doc. 20 at 14. Petitioner argues there is cause  
6 and prejudice based on his retention of a fraudulent law firm. Doc. 20-1 at 1, 10. Petitioner  
7 claims that this law firm deceived him into believing that it was working on his case for  
8 approximately two years. *Id.* at 1-2. But Petitioner did not retain this firm until *after* he  
9 had procedurally defaulted the objections he makes here. *See* Doc. 1 at 11. The earliest  
10 correspondence with this firm that Petitioner presents is from June 2017. Doc. 20-1 at 11.  
11 Petitioner’s direct appeal concluded with the Arizona Supreme Court denying review on  
12 March 20, 2013 (Doc. 15-11 at 181), and his post-conviction proceeding concluded with  
13 the Arizona Court of Appeals denying relief on August 2, 2016 (Doc. 15-12 at 34).  
14 Because Petitioner did not retain this firm until after he failed to present his claims in state  
15 court, the Court will accept Judge Fine’s recommendation that there was no excuse for his  
16 procedural defaults.

17 **4. Other Objections.**

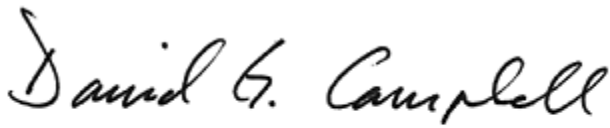
18 Petitioner makes several other arguments regarding perceived shortcomings of his  
19 trial (Doc. 20 at 9-12), but makes no direct objection to any specific portion of Judge Fine’s  
20 R&R. The Court is required to review only the “portion of the magistrate judge’s  
21 disposition to which specific written objection has been made[.]” Fed. R. Civ. P. 72(b)(2);  
22 *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Objections that do not explain the source of  
23 alleged error, but instead object generally to the entirety of a magistrate judge’s report,  
24 have “the same effect as would a failure to object.” *Warling v. Ryan*, No. CV 12-01396-  
25 PHX-DGC (SPL), 2013 WL 5276367, at \*2 (D. Ariz. Sept. 19, 2013) (quoting *Howard v.*  
26 *Sec’y of HHS*, 932 F.2d 505, 509 (6th Cir. 1991)). The Court accordingly will accept the  
27 remainder of Judge Fine’s recommendations. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ.  
28 P. 72(b)(3); *Thomas*, 474 U.S. at 149; *Reyna-Tapia*, 328 F.3d at 1121.

1           Petitioner also makes two arguments that were never presented in his habeas  
2 petition. First, he alleges prosecutorial misconduct because the trial court prosecutor  
3 claimed that Petitioner only had sex with his wife once or twice per year (Doc. 20-1 at 3)  
4 and did not “contribute to family income” (*Id.*). Second, Petitioner argues that he never  
5 admitted to having sexual relations with D.W. (Doc. 20 at 12-13). A party is not entitled  
6 to a review of arguments which are raised for the first time in an objection to the R&R, and  
7 the Court’s decision to consider them is discretionary. *See Brown v. Roe*, 279  
8 F.3d 742, 744 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000),  
9 *cert. denied*, 534 U.S. 831 (2001). Petitioner makes no effort to explain why he did not  
10 raise these arguments in either his original habeas petition (Doc. 1) or its supplement  
11 (Doc. 4). In its discretion, the Court will not consider these new arguments.

12           **IT IS ORDERED:**

- 13           1. Magistrate Judge Deborah M. Fine’s R&R (Doc. 19) is **accepted**.
- 14           2. Petitioner’s petition for writ of habeas corpus (Docs. 1, 4) is **denied**.
- 15           3. A certificate of appealability is **denied** because Petitioner has not made a  
16           substantial showing of the denial of a constitutional right as required by  
17           28 U.S.C. § 2253(c)(2).
- 18           4. The Clerk is directed to **terminate** this action.

19           Dated this 17th day of October, 2019.

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22           David G. Campbell  
23           Senior United States District Judge