

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 Petitioner was indicted on multiple counts of sexual abuse and child molestation
3 stemming from Petitioner’s conduct with three underage victims. (Answer, Ex. B.) On
4 November 10, 1998, Petitioner was sentenced to presumptive and consecutive prison terms
5 totaling 264.5 years. Because Petitioner had fled Maricopa County during pre-trial
6 proceedings, he was also convicted on charges of failing to appear, and sentenced to 1.5
7 years’ imprisonment. (Answer, Exs. UU-VV.)

8 Petitioner filed an appeal with the Arizona Court of Appeals in which he presented
9 seven claims for relief:

10 Appeal Claim 1: The jury panel was tainted in violation of Petitioner’s 6th and 14th
11 Amendment right to a fair trial;

12 Appeal Claim 2: The trial court excluded character evidence in violation of
13 Petitioner’s federal and state constitutional right to confront witnesses and prepare a
14 defense;

15 Appeal Claim 3: The trial court wrongly excluded evidence of punishment to justify
16 Petitioner’s flight in violation of Petitioner’s federal and state constitutional right to
17 proffer a defense;

18 Appeal Claim 4: The trial court wrongly permitted the State to vouch for its witnesses
19 in violation of federal and state law;

20 Appeal Claim 5: The trial court wrongly admitted irrelevant, prejudicial photographs
21 of the victims and Petitioner in violation of state law;

22 Appeal Claim 6: Petitioner’s federal and state due process rights were violated
23 because there was insufficient evidence to support counts 9 and 13 of the indictment;
24 and

25 Appeal Claim 7: The trial court violated state law by designating counts 2-9, 14, 15,
26 17 and 18 of the indictment as “dangerous” and in sentencing on counts 9 and 17.
27 (Answer, Ex. WW.)

28 The Court of Appeals affirmed Petitioner’s conviction and sentence on January 11,
2000. (Petition, Ex. Part I at 3.) Petitioner petitioned for review of that decision by the
Arizona Supreme Court; the Supreme Court denied review on December 12, 2000. (Petition,
Ex. Part I at 22.)

Petitioner instituted his first post-conviction relief proceedings pursuant to Rule 32,
Ariz. R. Crim. P. on December 20, 2000, when he filed a Notice of Post-Conviction Relief.

1 (Answer, Ex. YY.) The trial court later granted Petitioner permission to file a revised post-
2 conviction petition on April 22, 2005 (“Rule 32 Petition”). (Petition, Ex. Part I at 23.) The
3 Rule 32 Petition presented twelve claims:

4 Rule 32 Claim 1: Petitioner’s federal and state due process rights were violated
5 because he was prosecuted for acts that occurred outside the statute of limitations;

6 Rule 32 Claim 2: The prosecutor’s amendments to the Grand Jury indictment violated
7 Petitioner’s 5th, 6th and 14th Amendment rights;

8 Rule 32 Claim 3: Petitioner’s federal due process rights were violated when the trial
9 court admitted Petitioner’s private telephone conversations into evidence;

10 Rule 32 Claim 4: Petitioner’s due process rights were violated when the court
11 instructed the jury that it could consider evidence of other sexual offenses to the
12 extent such offenses showed Petitioner’s propensity for sexual misconduct;

13 Rule 32 Claim 5: Petitioner’s speedy trial rights were violated in his failure to appear
14 case (CR 98-90662);

15 Rule 32 Claim 6: The prosecutor engaged in prosecutorial misconduct when she (a)
16 amended the grand jury indictment twice, (b) told jurors that Petitioner had been
17 featured on America’s Most Wanted, (c) showed the jury a black suitcase with yellow
18 FBI tape around it but did not admit the suitcase into evidence, (d) told the jury that
19 Petitioner posted and forfeited a \$20,000 bond, (e) misstated facts to the jury
20 regarding Petitioner’s purchase of a Blazer SUV, (f) belatedly disclosed a State
21 witness’s criminal background, (g) admitted Petitioner’s private telephone
22 conversations into evidence and (h) misrepresented dates relevant to Petitioner’s
23 speedy trial deadline in his failure to appear case;

24 Rule 32 Claim 7: Petitioner’s due process rights were violated because the jury panel
25 did not represent a fair cross section of the community;

26 Rule 32 Claim 8: Petitioner’s 6th Amendment rights were violated because juror Jane
27 Hancock should have been stricken by the court for cause;

28 Rule 32 Claim 9: The trial court violated state law by failing to sever the trial;

Rule 32 Claim 10: Trial counsel was ineffective for failing to move to sever the trial;

Rule 32 Claim 11: Petitioner’s due process rights were violated because the trial court
relied on incorrect dates at sentencing; and

Rule 32 Claim 12: Petitioner’s trial and appellate counsel were ineffective when (a)
appellate counsel failed to raise on appeal each of the issues presented in Petitioner’s
Rule 32 Petition, (b) trial counsel failed to move for a continuance after the indictment
was amended during trial, (c) trial counsel failed to move to suppress admission of
Petitioner’s private telephone conversations, (d) trial counsel failed to object to the
“propensity” instruction given to the jury, (e) trial counsel miscalculated the speedy
trial deadline in Petitioner’s failure to appear case, (f) trial counsel failed to notice that
“gender was not fairly represented,” (g) trial counsel failed to file a motion to sever,
and (h) trial counsel failed to argue the correct offense dates at sentencing. (Answer,
Ex. ZZ.)

1 The trial court denied the Rule 32 Petition on October 25, 2005. (Petitioner, Ex. Part
2 I at 25.) The trial court considered claims 1, 10 and 12 on the merits, but concluded that
3 claims 2-9 and 11 were precluded by virtue of Rule 32.2(a)(3), Ariz. R. Crim. P., which
4 precludes from post-conviction relief claims that could have been raised on appeal.

5 Petitioner filed a petition for review of the trial court's decision in the Arizona Court
6 of Appeals, arguing that the trial court abused its discretion. Petitioner presented the same
7 twelve claims to the Court of Appeals that he presented to the trial court in his Rule 32
8 Petition. (Answer, Ex. CC.) On October 6, 2006, the Court of Appeals summarily denied
9 review. (Petition, Ex. Part I at 29.) Petitioner petitioned for review by the Arizona Supreme
10 Court (Answer, Ex. DD); the Supreme Court denied review on January 30, 2007. (Petition,
11 Ex. Part I at 31.)

12 On November 21, 2007, Petitioner filed his Petition for Writ of Habeas Corpus in
13 federal court. (Doc. No. 1.) Petitioner's Petition presents sixteen claims for relief:

14 **Ground 1:** Petitioner's 6th Amendment right to a jury trial was violated when 21
15 members of the jury panel stated that they were victims of abuse or knew someone
16 who was a victim of abuse and the trial court denied defense counsel's motion to
strike the entire jury panel on the grounds that it could not fairly hear the case;

17 **Ground 2:** Petitioner's 6th Amendment right to compel witnesses to attend was
18 violated when the trial court ruled that Petitioner's reputation for truthfulness was not
at issue and therefore Petitioner could not call witnesses prepared to testify to
Petitioner's good character and truthfulness;

19 **Ground 3:** Petitioner's 6th and 14th Amendment rights were violated when the trial
20 court allowed the jury to receive an instruction related to Petitioner's flight from the
state;

21 **Ground 4:** Petitioner's 6th and 14th Amendment rights were violated when (a) the
22 prosecutor, in her opening statements, told jurors that Petitioner was arrested out-of-
state after being featured on "America's Most Wanted," and (b) members of the jury
23 were overheard discussing local radio coverage of Petitioner's trial;

24 **Ground 5:** Petitioner's due process rights were violated when the trial court admitted
25 into evidence (a) a photo of the victims, and (b) police photographs depicting
Petitioner's abundance of body hair and a small abnormality on Petitioner's genitals;

26 **Ground 6:** Petitioner's due process rights were violated because Counts 9 and 13 of
Petitioner's indictment did not set forth specific evidence to support a conviction;

27 **Ground 7:** Petitioner's due process rights were violated when (a) the trial court
28 sentenced Petitioner as a dangerous offender on counts 2-9, 14, 15, 17 and 18 of the
indictment, when those counts were alleged as non-dangerous felonies;

1 **Ground 8:** Petitioner's federal and state due process rights were violated when he
2 was charged and convicted for crimes allegedly committed more than seven years
before the indictment;

3 **Ground 9:** Petitioner's federal and state due process rights were violated when the
4 indictment was amended twice, once before the jury, over Petitioner's objection;

5 **Ground 10:** Petitioner's 4th, 5th and 14th Amendment rights were violated when the
trial court admitted Petitioner's private telephone conversations into evidence;

6 **Ground 11:** Petitioner's due process rights were violated when the court instructed
7 the jury that it could consider evidence of other sexual offenses to the extent such
offenses showed Petitioner's propensity for sexual misconduct;

8 **Ground 12:** (a) Petitioner's right to a speedy trial was violated with respect to his
9 failure to appear (CR 98-90662), and (b) Petitioner's guilty plea in CR 98-90662 was
not entered into knowingly, intelligently, and voluntarily because he was unaware that
10 his speedy trial deadline had expired;

11 **Ground 13:** Petitioner's 5th, 6th, 8th and 14th Amendment rights were violated when
12 the prosecutor engaged in prosecutorial misconduct by (a) amending the grand jury
indictment twice, (b) telling jurors that Petitioner had been featured on America's
13 Most Wanted, (c) showing the jury a black suitcase with yellow FBI tape around it but
not admitting the suitcase into evidence, (d) telling the jury that Petitioner posted and
14 forfeited a \$20,000 bond, (e) misstating facts to the jury regarding Petitioner's
purchase of a Blazer SUV, (f) belatedly disclosing a State witness's criminal
15 background, (g) admitting Petitioner's private telephone conversations into evidence,
(h) misrepresenting dates relevant to Petitioner's speedy trial deadline in his failure
16 to appear case, and (i) engaging in all of the above misconduct, which amounted to
cumulative error.

17 **Ground 14:** Petitioner's 5th, 6th and 14th Amendment rights were violated when (a)
the jury panel selected did not represent a fair cross section of the community, (b) the
18 trial court failed to strike jury member Jane Hancock for cause, (c) the trial court
failed to sever the trial, (d) trial counsel failed to move for severance, and (e) the trial
19 court erred in sentencing by not applying the correct dates on which the crimes were
committed;

20 **Ground 15:** (a) Petitioner's 6th Amendment right to effective assistance of counsel
was violated because appellate counsel failed to raise on appeal each of the issues
21 presented in Petitioner's Rule 32 Petition; (b) trial counsel admitted to ineffectiveness
after the indictment was amended during trial; (c) the trial court failed to conduct an
22 evidentiary hearing regarding the claims of ineffective assistance of counsel raised in
Petitioner's Rule 32 Petition;

23 **Ground 16:** Petitioner's federal due process rights were violated by the preclusion
24 of certain claims by the state court on collateral review.

25 DISCUSSION

26 The Magistrate Judge recommends that the Petition be denied. First, Ground 16 does
27 not present a cognizable claim. Second, Grounds 4(a), 9-11, 12(a), 13, 14(a), 14(b) and 14(e)
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1 are procedurally barred on an independent state law ground. Third, Grounds 5, 7 and 14(c)
2 were not fairly presented as federal claims in the state court. Fourth, Grounds 3, 4(b), 12(b),
3 15(b) and 15(c) were not presented in state court. Finally, Grounds 1, 2, 6, 8, 14(d) and 15(a)
4 are without merit.

5 **A. Ground 16 states a non-cognizable claim.**

6 In Ground 16, Petitioner challenges the manner in which the state court reviewed his
7 conviction pursuant to Rule 32, Ariz. R. Crim. P. Petitioner's claim, although framed as a
8 due process violation, essentially argues that the trial court, during post-conviction relief
9 proceedings, should have held an evidentiary hearing to determine whether Petitioner wished
10 to waive the claims presented in his revised petition but not previously argued on direct
11 review.

12 The Ninth Circuit has clarified that procedural errors arising during post-conviction
13 relief proceedings are not cognizable in habeas corpus proceedings under 28 U.S.C. § 2254
14 because they do not challenge a petitioner's detention. *Franzen v. Brinkman*, 877 F.2d 26,
15 26 (9th Cir. 1989) (*per curiam*); *see also Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998);
16 *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997). Because Ground 16 challenges
17 Petitioner's post-conviction relief proceedings, it fails to state a cognizable claim and should
18 be dismissed.

19 **B. Exhaustion**

20 **i. Legal Standard**

21 Ordinarily, before a federal court will consider the merits of a habeas petition, the
22 petitioner must exhaust the remedies available to him in state court. 28 U.S.C.
23 §2254(b)(1)(A); *Picard v. Connor*, 404 U.S. 270, 275 (1971). First enunciated in *Ex parte*
24 *Royall*, 117 U.S. 241 (1886), the exhaustion requirement is designed "not to create a
25 procedural hurdle on the path to federal habeas court, but to channel claims into an
26 appropriate forum, where meritorious claims may be vindicated and unfounded litigation
27 obviated before resort to federal court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).
28 The requirement is grounded in principles of comity, and reflects a desire to protect state

1 courts' role in the enforcement of federal law. *Castille v. Peoples*, 489 U.S. 346, 349 (1989)
2 (citation omitted). The requirement is also based on a pragmatic consideration that fully
3 exhausted claims will usually be accompanied by a complete factual record once they reach
4 federal court. *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

5 A petitioner must exhaust his claims by fairly presenting them to the state's highest
6 court, either through a direct appeal or collateral proceedings, before a federal court will
7 consider the merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. *See Rose*, 455
8 U.S. at 519. A petitioner must have also presented his claim in a procedural context in which
9 its merits will be considered. *See Castille*, 489 U.S. at 351. A habeas petitioner's claims may
10 be precluded from federal review on exhaustion grounds in either of two ways. First, a claim
11 may be procedurally defaulted in federal court if it was actually raised in state court but
12 found by that court to be defaulted on state procedural grounds. *See Coleman v. Thompson*,
13 501 U.S. 722, 729-30 (1991). Second, the claim may be procedurally defaulted in federal
14 court if the petitioner failed to present the claim in a necessary state court and "the court to
15 which the petitioner would be required to present his claims in order to meet the exhaustion
16 requirement would now find the claims procedurally barred." *Id.* at 735 n.1. If a petitioner
17 has procedurally defaulted a claim in state court, a federal court will not review the claim
18 unless the petitioner shows "cause and prejudice" for the failure to present the constitutional
19 issue to the state court, or makes a colorable showing of actual innocence. *See Gray v.*
20 *Netherland*, 518 U.S. 152, 162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); *Murray*
21 *v. Carrier*, 477 U.S. 478, 485 (1986).

22 **ii. Grounds 4(a), 9-11, 12(a), 13, 14(a), 14(b) and 14(e) are procedurally**
23 **barred on an independent state law ground.**

24 Petitioner presented grounds 4(a), 9-11, 12(a), 13, 14(a), 14(b) and 14(e) in his Rule
25 32 Petition, but the trial court denied relief pursuant to Rule 32.2(a)(3), Ariz. R. Crim. P.,
26 which precludes from post-conviction relief claims that could have been raised on appeal.
27 Rule 32.2(a)(3) is an independent state law ground, *see Stewart v. Smith*, 536 U.S. 856, 860
28 (2002) (per curiam), and the Ninth Circuit has repeatedly determined that Arizona regularly

1 and consistently applies its preclusion rules such that they are an adequate bar to federal
2 review of a claim. *See Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (finding Rule
3 32.2(a)(3) regularly followed and adequate); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th
4 Cir. 1997) (same). Thus federal habeas review of Grounds 4(a), 9-11, 12(a), 13, 14(a), 14(b)
5 and 14(e) is barred unless Petitioner can demonstrate cause and prejudice or a fundamental
6 miscarriage of justice to excuse the default.

7 **iii. Grounds 5, 7 and 14(c) were not fairly presented as federal claims in the**
8 **state court.**

9 Petitioner presented Grounds 5, 7 and 14(c) on direct review. However, Petitioner
10 failed to argue these grounds based on federal law. Ground 5 alleges that Petitioner's due
11 process rights were violated when the trial court admitted into evidence (a) a photo of the
12 victims and (b) police photographs depicting Petitioner's abundance of body hair and a small
13 abnormality on Petitioner's genitals. On direct review, Petitioner argued to the Court of
14 Appeals that the photographs were prejudicial and irrelevant in violation of Rule 401, Ariz.
15 R. Evid.

16 Ground 7 alleges Petitioner's due process rights were violated when the trial court
17 sentenced Petitioner as a dangerous offender on counts 2-9, 14, 15, 17 and 18 of the
18 indictment, when those counts were alleged as non-dangerous felonies. In the Court of
19 Appeals, Petitioner argued that the trial court erred in classifying him as a dangerous offender
20 because the victim was 15 years old, making the offense a non-dangerous felony according
21 to A.R.S. § 13-701-13-702.02.

22 Ground 14(c) alleges that Petitioner's 5th, 6th and 14th Amendment rights were violated
23 when the trial court failed to sever the trial. In his Rule 32 Petition, Petitioner argued that
24 the trial court violated Rule 13.4(a), Ariz. R. Crim. P. and Arizona case law by failing to
25 sever his trial on its own initiative.

26 To properly exhaust state remedies, the petitioner must "fairly present" his claims to
27 the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526
28 U.S. 838, 848 (1999). A claim is "fairly presented" if the petitioner has described the

1 operative facts and the federal legal theory on which his claim is based so that the state courts
2 have a fair opportunity to apply controlling legal principles to the facts bearing upon his
3 constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S.
4 270, 277-78 (1971). Resolving whether a petitioner has fairly presented his claim to the state
5 court is an intrinsically federal issue to be determined by the federal court. *Wylde v.*
6 *Hundley*, 69 F.3d 247, 251 (8th Cir. 1995); *Harris v. Champion*, 15 F.3d 1538, 1556 (10th
7 Cir. 1994). Commenting on the importance of fair presentation, the United States Supreme
8 Court has stated:

9 If state courts are to be given the opportunity to correct alleged violations of
10 prisoners' federal rights, they must surely be alerted to the fact that the
11 prisoners are asserting claims under the United States Constitution. If a habeas
12 petitioner wishes to claim that an evidentiary ruling at a state court trial denied
13 him the due process of law guaranteed by the Fourteenth Amendment, he must
14 say so, not only in federal court, but in state court.

15 *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). Following *Duncan*, the Ninth
16 Circuit has held that a state prisoner has not "fairly presented" (and thus has not exhausted)
17 federal claims in state court unless he specifically indicated to that court that the claims were
18 based on federal law. *See, e.g., Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as*
19 *amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence,
20 right to be tried by impartial jury and ineffective assistance of counsel lacked specificity and
21 explicitness required to present federal claim); *Shumway v. Payne*, 223 F.3d 982, 987-88 (9th
22 Cir. 2000) (broad reference to "due process" insufficient to present federal claim); *see also*
23 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim
24 of state and federal error is insufficient to establish exhaustion.").

25 In state court, Petitioner alleged facts which form the bases of Grounds 5, 7 and 14(c),
26 but presented those allegations in support of claims arising under state law. (Answer, Ex.
27 WW.) Petitioner failed to make any reference to the United States Constitution, a federal
28 statute or a federal case. The state court was not alerted to a federal claim. Because Grounds
5, 7 and 14(c) were not fairly presented in state court, they remain unexhausted absent a
showing of cause and prejudice or a fundamental miscarriage of justice.

1 **iii. Grounds 3, 4(b), 12(b), 15(b) and 15(c) were not presented in state court.**

2 Petitioner failed to present Ground 3, 4(b), 12(b), 15(b) or 15(c) in either his direct
3 appeal or his Rule 32 Petition. Consequently, Petitioner has not fairly presented Ground 3,
4 4(b), 12(b), 15(b) or 15(c) and cannot raise those claims for the first time in federal court.
5 *See Rose*, 455 U.S. at 519 (stating that a petitioner must exhaust his claims by fairly
6 presenting them to the state's highest court, either through a direct appeal or collateral
7 proceedings, before a federal court will consider the merits of habeas corpus claims pursuant
8 to 28 U.S.C. § 2254). Petitioner is now precluded by Arizona Rules of Criminal Procedure
9 32.2(a)(3) and 32.4 from obtaining relief on Ground 3, 4(b), 12(b), 15(b) or 15(c) in state
10 court absent an applicable exception, which Petitioner does not assert. *See Ariz. R. Crim.*
11 *P. 32.2(b); 32.1(d)-(h)*. Thus, Ground 3, 4(b), 12(b), 15(b) and 15(c) are technically
12 exhausted but procedurally defaulted, absent a showing of cause and prejudice or a
13 fundamental miscarriage of justice.

14 **iv. Petitioner has not demonstrated cause and prejudice or made a colorable**
15 **showing of actual innocence.**

16 A federal court may only grant review of a procedurally defaulted claim if petitioner
17 makes a showing of cause and prejudice, *Netherland*, 518 U.S. at 162, or a colorable
18 showing of actual innocence amounting to a “fundamental miscarriage of justice.” *Sawyer*
19 *v. Whitley*, 505 U.S. 333, 336 (1992). To establish cause for a procedural default, a petitioner
20 must show an external impediment which rendered Petitioner unable to comply with the
21 procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show prejudice, the
22 petitioner bears the burden of demonstrating that the error worked to his substantial
23 disadvantage, infecting the entire trial with constitutional error. *Carrier*, 477 U.S. at 488. If
24 petitioner cannot meet one of the requirements, it is unnecessary for federal courts to address
25 the other requirement. *United States v. Frady*, 456 U.S. 152, 168 (1982). Petitioner may also
26 be granted federal review if he can demonstrate a fundamental miscarriage of justice. A
27 fundamental miscarriage of justice results when the petitioner can demonstrate that a
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1 constitutional error caused the conviction of one who is actually innocent. *Carrier*, 477 U.S.
2 at 496.

3 Petitioner does not present an “actual innocence” argument. Petitioner attempts to
4 demonstrate cause and prejudice for his default by arguing that his appellate counsel failed
5 to present necessary claims in his direct appeal. For reasons elucidated in section (C)(vii)
6 below, Petitioner’s appellate counsel was not ineffective. Therefore, Petitioner has failed to
7 demonstrate cause and prejudice.

8 Accordingly, Grounds 3, 4(a), 4(b), 5, 7, 9-11, 12(a), 12(b), 13, 14(a), 14(b), 14(c),
9 14(e), 15(b) and 15(c) were not properly exhausted and the Court need not consider the
10 merits of those claims.

11 **v. Exhausted claims**

12 Petitioner properly exhausted Grounds 1, 2 and 6 by fairly presenting them in his
13 direct appeal. Petitioner properly exhausted Grounds 8, 14(d) and 15(a) by fairly presenting
14 them in his Rule 32 Petition and in his petition for review by the Arizona Court of Appeals
15 of the trial court’s denial of his Rule 32 Petition.² Accordingly, the Court will consider the
16 merits of these claims.

17 **C. Merits**

18 **i. Legal Standard**

19 On habeas review, a state court's findings of fact are entitled to a presumption of
20 correctness when fairly supported by the record. *Wainwright v. Witt*, 469 U.S. 412, 426
21 (1985). The presumption of correctness also applies to a state appellate court's findings of
22 fact. *Sumner v. Mata*, 449 U.S. 539, 546 (1981). The question presented in a state prisoner's
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26 ² Respondents assert in their Answer that Petitioner failed to exhaust Ground 14(d)
27 because the trial court concluded that it was precluded under Rule 32.2(A)(3), Ariz. R. Crim. P.
28 The Court disagrees. Petitioner presented Ground 14(d) in his Rule 32 Petition as a federal
ineffective assistance of counsel claim. (Answer, Ex. ZZ, pg. 21.) The trial court, in denying
Petitioner’s Rule 32 Petition, considered his ineffective assistance of counsel claims on the
merits.

1 petition for a writ of habeas corpus is “whether the state proceedings satisfied due process.”
2 *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991).

3 Federal courts may entertain a state prisoner’s petition for habeas relief only on the
4 grounds that the prisoner’s confinement violates the Constitution, laws, or treaties of the
5 United States. *Reed v. Farley*, 512 U.S. 339 (1994). General improprieties occurring in state
6 proceedings are cognizable only if they resulted in fundamental unfairness and consequently
7 violated the petitioner’s Fourteenth Amendment right to due process. *Estelle v. McGuire*,
8 502 U.S. 62, 67-68 (1991)(“[I]t is not the province of a federal habeas court to reexamine
9 state court determinations on state law questions.”); *Bonin*, 77 F.3d at 1158. The Supreme
10 Court has held in the habeas context that “this Court will not review a question of federal law
11 decided by a state court if the decision of that court rests on a state law ground that is
12 independent of the federal question and adequate to support the judgment.” *Coleman v.*
13 *Thompson*, 501 U.S. 722, 729 (1991). The provisions of the Anti-Terrorism and Effective
14 Death Penalty Act (AEDPA) govern this case and pose special burdens. *Chein v. Shumsky*,
15 373 F.3d 978, 983 (9th Cir.2004) (en banc). Under AEDPA, when reviewing a state criminal
16 conviction, a federal court may grant a writ of habeas corpus only if a state court proceeding
17 “(1) resulted in a decision that was contrary to, or involved an unreasonable application of,
18 clearly established Federal law, as determined by the Supreme Court of the United States;
19 or (2) resulted in a decision that was based on an unreasonable determination of the facts in
20 light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

21 Under § 2254(d)(1), a state court decision is “contrary to” clearly established Supreme
22 Court precedent “if the state court applies a rule that contradicts the governing law set forth”
23 in Supreme Court cases or “if the state court confronts a set of facts that are materially
24 indistinguishable from” a Supreme Court decision but “nevertheless arrives at a result
25 different from” that precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state
26 court decision is an unreasonable application of clearly established federal law if “the state
27 court identifies the correct governing legal principle” from a Supreme Court decision “but
28 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. In

1 considering whether a state court has unreasonably applied Supreme Court precedent, "a
2 federal habeas court may not issue the writ simply because that court concludes in its
3 independent judgment that the relevant state-court decision applied clearly established
4 federal law erroneously or incorrectly. Rather, that application must also be unreasonable."
5 *Id.* at 411; *Bell v. Cone*, 535 U.S. 685, 694 (2002). In conducting habeas review, we
6 "presum[e] that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19,
7 24 (2002).

8 **ii. Ground 1**

9 When applying the AEDPA and reviewing whether a state court decision is contrary
10 to federal law, this court must look to the state's last reasoned decision as the basis for its
11 judgment. *See Avila v. Galaza*, 297 F.3d 911, 918 & n. 6 (9th Cir. 2002). Thus, this Court
12 must consider whether the Arizona Court of Appeals' January 11, 2000 decision involved
13 an unreasonable application of clearly established federal law or was based on an
14 unreasonable determination of the facts in light of the evidence presented in the State court
15 proceeding.

16 In Ground 1, Petitioner contends that his Sixth Amendment right to a jury trial was
17 violated when 21 members of the jury panel stated that they were victims of abuse or knew
18 someone who was a victim of abuse, and the trial court denied defense counsel's motion to
19 strike the entire jury panel on the grounds that it could not fairly hear the case. (Doc. No. 1.)

20 In considering Ground 1, the Court of Appeals reasonably applied the appropriate
21 federal law. The Court of Appeals analyzed Petitioner's 6th Amendment claim in light of
22 *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998), *State v. Doerr*, 969 P.2d 1168 (Ariz. 1998)
23 and *State v. Davis*, 672 P.2d 480 (Ariz. App. 1983), all of which cite to the Sixth
24 Amendment's guarantee of a fair trial by a panel of impartial, "indifferent" jurors. The Court
25 of Appeals, citing *Davis*, correctly noted that the burden is upon Petitioner to show that the
26 jury panel was so infected by the statements made during the voir dire that the jurors could
27 not set aside any impression or opinion and render a verdict based on the evidence presented
28 in court. *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

1 The Court of Appeals' application of federal law to the facts before it was reasonable.
2 The Court of Appeals held that, unlike the *Mach* case, there were no expert-like opinions
3 offered by prospective jurors. The Court of Appeals noted that the trial court purposely
4 avoided eliciting potentially prejudicial details of jurors' own experiences, invited counsel
5 to inform the court if they felt that any juror should be examined in private regarding possible
6 bias, asked panel members whether they had any residual concerns given the topics discussed
7 during *voir dire*, and properly instructed the jury on the presumption of innocence and burden
8 of proof. These safeguards are considered appropriate protection of a defendant's 6th
9 Amendment right to an impartial jury. *See United States v. Trujillo*, 146 F.3d 838, 843 (11th
10 Cir. 1998). The Court of Appeals correctly concluded that Petitioner failed to demonstrate
11 that the jury panel was so infected by the statements made during the *voir dire* that the jurors
12 could not render a verdict based on the evidence presented in court. Accordingly,
13 Petitioner's claim with respect to Ground 1 is without merit.

14 **iii. Ground 2**

15 In Ground 2, Petitioner contends that his 6th Amendment right to compel witnesses to
16 attend was violated when the trial court ruled that Petitioner's reputation for truthfulness was
17 not at issue and therefore Petitioner could not call witnesses prepared to testify to Petitioner's
18 good character and truthfulness.

19 In considering Ground 2, the Court of Appeals reasonably applied the appropriate
20 federal law. The Court of Appeals considered the claim in light of Rule 404, Ariz. R. Evid.,
21 which is identical to the federal rule regarding admission of character evidence. The Court
22 of Appeals also reasoned that even if the trial court erred in precluding Petitioner from
23 presenting his character witnesses at trial, the error was harmless because it did not affect the
24 verdict. This application of the harmless error standard was a correct interpretation of federal
25 law. Under federal law, if an appellate court can state with adequate assurance that the jury
26 was unaffected, or had but a slight effect, the verdict must stand. *See United States v. Bruce*,
27 394 F.3d 1215, 1229 (9th Cir. 2005) (quoting *Kotteakos v. United States*, 328 U.S. 750,
28 764-65 (1946)).

1 The Court of Appeals' application of federal law to the facts before it was reasonable.

2 The Court of Appeals in its Memorandum Decision stated:

3 The three victims testified to hundred of incidents of sexual abuse by Gordon
4 over the course of a decade. In almost all instances, only the particular victim
5 and Gordon were present. Moreover, in light of Gordon's admissions in the
6 confrontation call, his interstate flight and efforts to avoid capture, and the
jury's implicit rejection of the evidence admitted in his defense, we can safely
conclude that evidence of Gordon's law-abiding reputation would not have
affected the verdict.

7 (Petition, Court of Appeals Memorandum Decision at 10.) This Court agrees that the
8 evidence against Petitioner was so overwhelming that evidence of Petitioner's character for
9 truthfulness would not have affected the jury's verdict.

10 Petitioner also argues in Ground 2 that testimony regarding his character for
11 truthfulness would have been relevant because it would have demonstrated that Petitioner
12 was telling the truth when, in a secretly-recorded telephone call presented by the State, he
13 denied performing oral sex on "E," one of the victims. E testified at trial, however, that
14 Petitioner never gave him "a blow job." (Petition, Ex. 1, pg. 10.) Thus, E offered testimony
15 consistent with Petitioner's denials. Finally, Petitioner was permitted to offer testimony from
16 "non-event" witnesses who testified that they had lived and worked with Petitioner and had
17 not seen him engage in inappropriate conduct with the victims. Accordingly, Petitioner's
18 claim with respect to Ground 2 is without merit.

19 **iv. Ground 6**

20 In Ground 6, Petitioner claims that his due process rights were violated because the
21 record does not set forth specific evidence to support a conviction on Counts 9 and 13 of
22 Petitioner's indictment.

23 In considering Ground 6, the Court of Appeals reasonably applied the appropriate
24 federal law. The Court held that Petitioner's conviction could not be reversed based upon
25 insufficiency of the evidence unless, resolving all conflicts in the evidence against the
26 defendant, there was a complete absence of probative facts to support the conviction.
27 (Petition, Ex. 1, pg. 18.) This is the federal standard. *See Jackson v. Virginia*, 443 U.S. 307,
28 318 (1979).

1 The Court of Appeals' application of federal law to the facts before it was reasonable.
2 Petitioner challenged the sufficiency of the evidence related to count 9, which alleged that
3 Petitioner had engaged in sexual conduct with victim "C," a minor under the age of fourteen,
4 between July 1982 and July 4, 1988. (Petition, Ex. 1, pgs. 18-19). Although C testified that
5 he recalled engaging in sexual conduct with Petitioner on a boat on July 4, 1989, C also
6 testified that he believed the incident occurred before he was fifteen. (C was born on May
7 2, 1974). The Court of Appeals reasonably concluded that sufficient evidence existed to
8 sustain the verdict in light of C's testimony. The jury may have concluded that C was
9 mistaken that the incident occurred on July 4, 1989, but was correct in his recollection that
10 the incident occurred when he was under the age of fifteen. Furthermore, C testified that
11 during the decade preceding his eighteenth birthday, Petitioner touched him sexually
12 hundreds of times each year.

13 Petitioner also challenged the sufficiency of the evidence related to count 13, which
14 accused him of furnishing C with material harmful to minors in the form of a pornographic
15 video entitled "All American Girls in Heat." Petitioner claims that because the video was
16 not available at trial, the jurors could not determine whether the video was pornographic in
17 nature. The Court of Appeals rejected this argument, concluding that the jury could
18 reasonably conclude that the video was harmful to minors based on the evidence presented.
19 This Court agrees that sufficient evidence was presented from which the jury could conclude
20 that "All American Girls in Heat" was harmful to minors. C testified at trial that Petitioner
21 first showed him the video when he was 8 or 9 and that the video was a sexually-graphic
22 video in which a person stranded on a raft is picked up by a yachtful of women and engages
23 in heterosexual sex acts with them. (Ex. DD, pg. 24.) Accordingly, Petitioner's claim with
24 respect to Ground 6 is without merit.

25 **v. Ground 8**

26 In Ground 8, Petitioner contends that his due process rights were violated when he
27 was charged and convicted for crimes allegedly committed more than seven years before the
28 indictment. This argument was presented to the trial court in Petitioner's Rule 32 Petition,

1 and thus the Court looks to the trial court's October 25, 2005 decision as the state's last
2 reasoned decision and the basis for its judgment. *See Avila*, 297 F.3d at 918 & n. 6.

3 The trial court did not consider Ground 8 as a federal claim. Instead the trial court
4 stated that “[b]y it’s [sic] very terms, A.R.S. § 13-107(B) requires that prosecution
5 commence within the applicable time period after ‘actual discovery’ by the charging
6 authority or after a reasonably diligent charging authority would have discovered the
7 misconduct. Defendant is not entitled to relief on this ground.” (Petition, Ex. 1, pgs. 25-26.)
8 This holding was not contrary to clearly established federal law, did not involve an
9 unreasonable application of federal law, and was not based on an unreasonable determination
10 of the facts. The statute of limitations for charges of sexual abuse and child molestation is
11 seven years. *See* A.R.S. § 13-107. As the trial court noted, the statute of limitations begins
12 to run once the State discovers, or reasonably could have discovered, the crime. The first
13 report of sexual abuse by any of the victims occurred in June, 1994. (Answer, Ex. II, pgs.
14 35-37.) Petitioner was indicted in 1996. Thus, no violation of the statute of limitations
15 occurred. Accordingly, Petitioner’s claim with respect to Ground 8 is without merit.

16 **vi. Ground 14(d)**

17 In Ground 14(d), Petitioner contends that his trial counsel was ineffective because trial
18 counsel failed to file a motion for severance.

19 The trial court did not specifically address this ineffective assistance of counsel claim.
20 Instead, the trial court denied each of Petitioner’s ineffective assistance of trial counsel
21 claims, concluding that “trial counsel has long held the reputation of leaving no stone
22 unturned in defense of his clients. Nothing that counsel did or failed to do in this case
23 suggests that he did not live up to his reputation. Even a cursory review of the record
24 demonstrates that trial counsel’s performance was not deficient.” This holding was not
25 contrary to clearly established federal law, did not involve an unreasonable application of
26 federal law, and was not based on an unreasonable determination of the facts.

27 Pursuant to the Sixth Amendment of the United States Constitution, a criminal
28 defendant has a right to “effective assistance of counsel.” *Strickland v. Washington*, 466

1 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The *Strickland* standard for
2 ineffective assistance of counsel has two components. A defendant must first demonstrate
3 that counsel's performance was deficient, *i.e.*, that counsel made errors so serious that counsel
4 was not functioning as the "counsel" guaranteed a defendant by the Sixth Amendment. 466
5 U.S. at 687. It requires the defendant to show that counsel's conduct "fell below an objective
6 standard of reasonableness." 466 U.S. at 687-688. Second, a defendant must show that the
7 mistakes made were "prejudicial to the defense," that is, the mistakes created a "reasonable
8 probability that, but for [the] unprofessional errors, the result of the proceeding would have
9 been different." 466 U.S. at 694. Counsel's performance is strongly presumed to fall within
10 the ambit of reasonable conduct unless Movant can show otherwise. *Id.* at 689-90.

11 Petitioner claims that his trial counsel was deficient in failing to move for a severance
12 such that Petitioner would be tried in three separate trials, one for each victim. Petitioner
13 claims he was prejudiced by being tried for crimes against all three victims when the State
14 admitted into evidence a secretly-recorded telephone conversation in which Petitioner
15 admitted to engaging in sexual conduct with one of the victims.

16 Rule 13.3(a), Ariz. R. Crim. P., provides that offenses maybe joined in an indictment
17 if they are of the same or similar character, are based on the same conduct, or are alleged to
18 have been part of a common scheme or plan. A defendant is entitled as of right to sever
19 offenses joined as "same or similar character" unless evidence of the other offense or
20 offenses would be admissible under applicable rules of evidence if the offenses were tried
21 separately. *See* Rule 13.4, Ariz. R. Crim. P. In the present case, the charges against
22 Petitioner were properly joined because, although they involved three different victims, they
23 were all of the same or similar character and were all parts of a common scheme. The
24 victims were siblings and neighbors of Petitioner, and Petitioner routinely molested them
25 over several years. Defendant was not prejudiced by the joinder; the telephone conversation
26 would have been cross-admissible in separate trials under the common-law propensity
27 exception to the exclusion of evidence of prior bad acts in cases involving charges of sexual
28 misconduct. *See State v. Aguilar*, 97 P.3d 865, 868 (Ariz. 2004). Because the joinder was

1 proper, and because Petitioner was not prejudiced by the joinder, Petitioner’s trial counsel
2 was not deficient in failing to move for a severance. Failure to take futile action can never
3 be deficient performance. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996).

4 **vii. Ground 15(a)**

5 In Ground 15(a), Petitioner contends that his appellate counsel was ineffective for
6 failing to raise on appeal each of the issues presented in Petitioner’s Rule 32 Petition. The
7 Court interprets this argument to mean that if Petitioner’s appellate counsel had presented
8 claims 2-9 and 11 in his Rule 32 Petition in his appeal, those claims would not have been
9 deemed precluded by the trial court during post-conviction relief proceedings.

10 In considering Ground 15(a), the trial court reasonably applied the appropriate federal
11 law. The trial court held that “in order to obtain relief, defendant must show that counsel’s
12 performance was deficient and that defendant was prejudiced as a result of the deficient
13 performance.” (Petition, Ex. 1, pg. 26.) This is the *Strickland* standard.

14 The trial court’s application of federal law to the facts before it was reasonable. The
15 trial court concluded that “effective assistance of appeal requires a thorough review of the
16 record and a ‘winnowing out’ of claims that are not only unlikely to persuade the appellate
17 court to grant relief but may, in fact, detract from the presentation and cause the appellate
18 court to give less than full consideration to the issues that are most likely to succeed.
19 Appellate counsel in this case raised the issues he felt were most likely to persuade the court
20 of appeals to grant relief. It was not incumbent upon him to raise all claims that defendant
21 may think he should have raised.” (Petition, Ex. 1, pgs. 26-27.) The Court concludes that
22 appellate counsel's decision not to include claims 2-9 and 11 from Petitioner’s Rule 32
23 Petition in his appeal was reasonable because those claims did not present a strong likelihood
24 of reversal, as detailed below.

25 Rule 32 Claim 2: Petitioner claims that the prosecutor’s amendments to the Grand
26 Jury indictment violated Petitioner’s 5th, 6th and 14th Amendment rights. This argument lacks
27 merit because the amendments of the indictments never deprived Petitioner of notice or the
28 ability to defend himself against the charges. *See Mira v. Marshall*, 806 F.2d 636, 629 (6th

1 Cir. 1986) (“An indictment which fairly but imperfectly informs the accused of the offense
2 for which he is to be tried does not give rise to a constitutional issue cognizable in habeas
3 proceedings.”).

4 Rule 32 Claim 3: Petitioner claims that his federal due process rights were violated
5 when the trial court admitted Petitioner’s private telephone conversations into evidence. This
6 argument lacks merit because playing the tape-recorded telephone conversation – in which
7 Petitioner spoke with victim E voluntarily -- did not amount to forcing Petitioner to testify
8 in court or otherwise breach his Fifth Amendment rights. *See Hoffa v. United States*, 385
9 U.S. 293, 304 (1966).

10 Rule 32 Claim 4: Petitioner claims that his due process rights were violated when the
11 court instructed the jury that it could consider evidence of other sexual offenses to the extent
12 such offenses showed Petitioner’s propensity for sexual misconduct. This argument lacks
13 merit because there is no clearly established legal precedent to support the argument. *See*
14 *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) (reserving the question of whether a
15 propensity instruction violates due process); *see also Larson v. Palmateer*, 515 F.3d 1057,
16 1066 (9th Cir. 2008) (same).

17 Rule 32 Claim 5: Petitioner claims that his speedy trial rights were violated in his
18 failure to appear case. This argument lacks merit because Petitioner was brought to “trial”
19 (*ie*, Petitioner entered into a plea agreement) on his failure to appear case within three months
20 of non-excluded time.

21 Rule 32 Claim 6: Petitioner claims that the prosecutor engaged in prosecutorial
22 misconduct. This argument lacks merit because the minor issues presented by Petitioner with
23 respect to this claim do not involve any illegal conduct by the prosecutor and did not affect
24 the fairness of his trial.

25 Rule 32 Claim 7: Petitioner claims that his due process rights were violated because
26 the jury panel did not represent a fair cross section of the community. Approximately 40%
27 of the jury panel were male; according to Petitioner, Maricopa County is 48% male. This 8%
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1 differential does not give rise to a legitimate due process claim. *See United States v.*
2 *Irurita-Ramirez*, 838 F.Supp. 1385, 1389 (C.D.Cal. 1993).

3 Rule 32 Claim 8: Petitioner claims that his 6th Amendment rights were violated
4 because juror Jane Hancock should have been stricken by the court for cause. This claim
5 lacks merit because Petitioner has failed to demonstrate that juror Hancock was biased
6 against him. Although she was molested as a child, she also had a father who was falsely
7 accused of molestation, stressed her ability to remain fair and impartial to both sides,
8 explained that she is required to be objective in her profession as an educator who receives
9 reports of abuse, described herself as “too objective to a fault,” and confirmed that she would
10 approach the case with an open mind. (Answer, Ex. X, pgs. 40-41, 54, 172-73.).

11 Rule 32 Claim 9: Petitioner claims that the trial court violated state law by failing to
12 sever the trial. For the reasons stated in section (C)(vi), above, this argument is without
13 merit.

14 Rule 32 Claim 11: Petitioner claims that his due process rights were violated because
15 the trial court relied on incorrect dates at sentencing. This argument is without merit because
16 Petitioner fails to allege how the trial court erred or how any of his sentences would have
17 been different but for the trial court’s error.

18 In sum, the numerous arguments that Petitioner believes his appellate counsel should
19 have raised on appeal are without legal merit. Failure to take futile action can never be
20 deficient performance. *Rupe*, 93 F.3d at 1445. Accordingly, Petitioner's appellate counsel
21 was not unreasonable in deciding not to raise these issues on appeal. Petitioner has failed to
22 rebut the strong presumption that his appellate counsel's performance fell within the wide
23 range of professional assistance. *See Strickland*, 466 U.S. at 689. Accordingly, Ground
24 15(a) is without merit.

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CONCLUSION

Based on the foregoing, the Magistrate Judge recommends that the District Court enter an order DENYING the Petition for Writ of Habeas Corpus.

Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within ten days of being served with a copy of the Report and Recommendation. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **CV-07-2279-PHX-ROS**.

The Clerk is directed to mail a copy of the Report and Recommendation to Petitioner and counsel for Respondents.

DATED this 24th day of March, 2009.


Jennifer C. Guerin
United States Magistrate Judge