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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LUIS MARIANO MARTINEZ,)
)
 Petitioner,)
)
 v.) CIV 08-00785 PHX JAT (MEA)
)
 DORA B. SCHRIRO, et al.,) REPORT AND RECOMMENDATION
)
 Respondents.)
 _____)

TO THE HONORABLE JAMES A. TEILBORG:

Petitioner, who is represented by counsel from the Arizona Justice Project which is affiliated with the Arizona State University School of Law, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 24, 2008. See Docket No. 1. Respondents filed a Limited Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 10) on July 28, 2008, asserting Petitioner's habeas claims are procedurally barred. Petitioner filed a Reply to the Limited Answer to his habeas petition through counsel on September 2, 2008. See Docket No. 11.

I Procedural History

In August of 2001 a jury found Petitioner guilty on two counts of sexual conduct with a minor under the age of 15. See Answer, Exh. I. The crimes were alleged to have occurred on a

1 single date in 1999 and involved one victim, a girl eleven years
2 of age on that date. E.g., id., Exh. E at 1-2. The victim was
3 the child of Petitioner's wife, who resided with the couple and
4 her two brothers. Id., Exh. E at 1-2. A video-tape of a
5 forensic interview with the victim by a social worker, during
6 which the victim described the abuse, was shown to the jury over
7 the objection of defense counsel. See id., Exh. E at 5.

8 After Petitioner's arrest and before his trial, the
9 victim recanted her statements to various individuals, including
10 her grandmother. Id., Exh. E at 8. The victim's grandmother
11 and the other individuals to whom the victim recanted her
12 statements testified at Petitioner's trial. Id., Exh. E at 8.
13 Additionally, a second forensic interview with the social
14 worker, during which interview the victim recanted her
15 allegations, was shown to the jury. Id., Exh. E at 6.

16 Petitioner was represented by an appointed public
17 defender at his trial. See id., Exh. B. At Petitioner's trial,
18 in response to questions from the prosecution, the victim
19 repeatedly answered "I don't know" or "I don't remember." Id.,
20 Exh. N at 3. At Petitioner's trial the victim denied Petitioner
21 had sexually abused her. Id., Exh. I at 3.

22 The victim's mother, Petitioner's wife, testified for
23 the defense.¹ Id., Exh. E at 10. Petitioner's wife testified

24
25 ¹ Prior to the trial the Superior Court appointed counsel
26 to represent Petitioner's wife because the state informed the court
27 it believed Petitioner's wife committed a criminal act by providing
28 the media with a copy of the grand jury transcript. Outside the
presence of the jury, before she testified at Petitioner's trial, the
state indicated that they were considering charging Petitioner's wife

1 that she did not believe her daughter had told the truth about
2 the alleged incident. Id., Exh. E at 12. Petitioner's wife
3 also testified that her daughter had told her the daughter had
4 lied about the alleged abuse both to the police and in the
5 initial forensic examination. Id., Exh. E at 12-14.

6 On February 19, 2002, pursuant to the jury finding him
7 guilty, Petitioner was sentenced to consecutive terms of life
8 imprisonment with no possibility of parole for 35 years pursuant
9 to each conviction for sexual conduct with a minor. Id., Exh.
10 I.

11 Petitioner took a direct appeal of his convictions and
12 sentences. Id., Exh. I. Petitioner was represented by retained
13 counsel, Ms. Levitt, in his direct appeal. Id., Exh. B. In his
14 direct appeal Petitioner asserted that the verdicts were against
15 the weight of the evidence and that the trial court erred by
16 denying his motion for a mistrial based on prosecutorial
17 misconduct. Id., Exh. J (petition for review to the Arizona
18 Supreme Court). Petitioner also asserted the trial court erred
19 by denying his motion for a new trial based on newly discovered
20 evidence, i.e., exculpatory statements in the victim's diary
21 which were produced by the victim's mother after the trial.
22 Id., Exh. J.

23 _____
24 with a crime, i.e., disclosure of the transcript. The state also
25 asserted that any discrepancies in Petitioner's wife's testimony and
26 her earlier statements might result in charges of perjury. In
27 response, defense counsel moved for a mistrial based on prosecutorial
28 misconduct for threatening a defense witness, informing the court that
Petitioner's wife was shaken and afraid to testify on Petitioner's
behalf, affecting her credibility before the jury. Answer, Exh. E at
11.

1 Petitioner's direct appeal was stayed on May 13, 2002,
2 to allow Petitioner's then-pending first action for post-
3 conviction relief to be decided by the trial court. See id.,
4 Exh. A. The same retained counsel represented Petitioner in his
5 direct appeal and his first state action for post-conviction
6 relief. Id., Exh. B & Exh. D. After the conclusion of
7 Petitioner's first action for post-conviction relief, on March
8 22, 2004, the Arizona Court of Appeals affirmed Petitioner's
9 convictions and sentences in his direct appeal. Id., Exh. I.
10 Petitioner sought review of this decision by the Arizona Supreme
11 Court, which declined review on September 21, 2004. Id., Exh.
12 K.

13 Petitioner had initiated a first state action for post-
14 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
15 Procedure, on May 28, 2002, prior to the time his direct appeal
16 was decided. Id., Exh. B. Petitioner was represented by
17 retained counsel, Ms. Levitt, in his first post-conviction
18 action. Id., Exh. B & Exh. F. After asking for several
19 extensions of time to review the record, Petitioner's counsel
20 informed the state court she could find no meritorious argument
21 to raise on Petitioner's behalf. Id., Exh. F. Petitioner did
22 not file a *pro se* pleading in his Rule 32 action and, when the
23 time for doing so expired on April 28, 2003, the state court
24 dismissed the Rule 32 action. Id., Exh. G. As stated *supra*,
25 upon this dismissal Petitioner's ultimately unsuccessful direct
26 appeal resumed and concluded in September of 2004.

1 and that Petitioner had not met an exception to the timeliness
2 rule. The state court also concluded that the claims were
3 procedurally barred, and that the claims were without merit.
4 Id., Exh. N. With regard to the merits of Petitioner's claims,
5 the state court concluded Petitioner's trial counsel's
6 performance was not deficient and that Petitioner was not
7 prejudiced by any of the alleged deficiencies. The state court
8 determined any further impeachment of the victim by her
9 inconsistent pretrial statements would have been cumulative.
10 The state court also decided Petitioner's counsel's strategy to
11 not engage in a battle of experts with regard to CSAAS was not
12 deficient performance nor prejudicial to Petitioner. The state
13 court concluded any such error was not prejudicial, *inter alia*
14 because counsel effectively cross-examined the state's witness
15 on this point. Id., Exh. N.

16 Petitioner sought a rehearing regarding this decision,
17 which motion was denied on December 1, 2005. Id., Exh. O & Exh.
18 P. Although the trial court concluded it had erred by finding
19 the claims stated in the second Rule 32 action time-barred, it
20 again found the claims were procedurally barred and without
21 merit. Id., Exh. P. The Arizona Court of Appeals denied review
22 of this decision on August 31, 2006. Id., Exh. R. The Arizona
23 Supreme Court also denied review on May 22, 2007. Id., Exh. S.

24 Petitioner filed his federal habeas petition on April
25 24, 2008. Petitioner argues he is entitled to federal habeas
26 relief because he was denied his right to the effective
27 assistance of trial and appellate counsel.

1 Respondents contend relief on Petitioner's federal
2 habeas claims is procedurally barred because the claims were not
3 properly exhausted in the state courts and Petitioner has not
4 shown cause for, nor prejudice arising from, his procedural
5 default of the claims. Respondents argue the state court's
6 decision finding consideration of the merits of the claims
7 procedurally precluded was an adequate and independent basis for
8 barring federal habeas relief on the merits of the claims.

9 Replying to the assertion that his claims are
10 procedurally defaulted, Petitioner contends his claims "are not
11 procedurally defaulted because he did not receive the effective
12 assistance of **first post-conviction** counsel--specifically with
13 respect to ineffective assistance of **trial** counsel--to which he
14 was entitled under Halbert v. Michigan, 545 U.S. 605 (2005)."²
15 Docket No. 11 at 2 (emphasis in original). Petitioner asserts
16 "Respondents' procedural-default defense is without merit."

17
18 ² In Halbert the United States Supreme Court concluded that
19 the federal constitutional guarantees of due process and equal
20 protection required the appointment of counsel for indigent
21 defendants, convicted pursuant to guilty pleas, for purposes of their
22 "first-tier" review in the Michigan Court of Appeals. The Supreme
23 Court determined that the defendant could not have waived his due
24 process and equal protection rights to appointed counsel by means of
25 his guilty plea. See 545 U.S. 605, 125 S. Ct. 2582 (2005). The
26 Sixth Circuit Court of Appeals has concluded that Halbert is not
27 applicable to cases on collateral review at the time it was decided.
28 See Simmons v. Kapture, 516 F.3d 450, 451 (2008). Nonetheless, the
issue in Halbert was the defendant's entitlement to appointed counsel
during his first appeal as of right after pleading guilty. Petitioner
argues Halbert provides that a non-pleading Arizona defendant, for
whom a first Rule 32 action is not their first appeal as of right, is
constitutionally entitled to the effective assistance of Rule 32
counsel because this is the first instance at which an Arizona
defendant may properly raise a claim that he was deprived of his Sixth
Amendment right to the effective assistance of trial counsel.

1 Id. Petitioner notes that his second state action for post-
2 conviction relief "argued that his ineffective-assistance-of-
3 trial-counsel claims could not be 'precluded' because (1) he was
4 entitled to effective assistance of first post-conviction
5 counsel with respect to the ineffective-assistance-of-counsel
6 claims, and (2) first post-conviction counsel () was
7 ineffective." Id.³

8 Petitioner contends his case is controlled by Halbert,
9 which was issued during the pendency of Petitioner's second
10 action for state post-conviction relief. Petitioner contends he
11 has federal constitutional right to the effective assistance of
12 counsel not only for purposes of his direct appeal but also in
13 his first state action for post-conviction relief. Petitioner
14 argues Halbert established this right because, in Arizona, a
15 defendant's first Rule 32 action is their "first-tier review" of
16 claims of ineffective assistance of trial counsel. Accordingly,
17 Petitioner asserts, an ineffective assistance of trial counsel

18
19 ³ In Arizona both pleading and non-pleading indigent
20 defendants are appointed counsel for their first Rule 32 proceedings.
21 However, this "right" has been held to be a matter of state law, not
22 a federal constitutional right. In Cook v. Schriro the Ninth Circuit
23 recently stated: "There is no constitutional right to counsel,
24 however, in state collateral proceedings after exhaustion of direct
25 review." 538 F.3d 1000, 2008 WL 3484870, at * 18, citing Pennsylvania
26 v. Finley, 481 U.S. 551, 556, 107 S. Ct. 1990, 1994 (1987) ("[I]t is
27 the source of that right to a lawyer's assistance, combined with the
28 nature of the proceedings, that controls the constitutional question.
In this case, respondent's access to a lawyer is the result of the
State's decision, not the command of the United States
Constitution."). The Cook decision continues: "Under Arizona law, a
defendant is only entitled to counsel through the disposition of his
or her first post-conviction petition. ... Because Cook had no
constitutional right to counsel at the motion for rehearing [of his
first post-conviction action] stage, any errors by his counsel could
not constitute cause to excuse the default..."

1 claim can only properly be raised in a first Rule 32 action and
2 post-conviction counsel who fails to raise such a claim is
3 unconstitutionally ineffective. Id. at 6-7 & 10.⁴ Petitioner
4 further contends that the Arizona courts' procedural rule,
5 precluding claims of ineffective assistance of post-conviction
6 counsel in a subsequent Rule 32 action, is not an "adequate"
7 state rule which would provide an independent basis for barring
8 consideration of the merits of Petitioner's habeas claims. Id.
9 at 10. Petitioner also asserts that, if he has procedurally
10 defaulted his habeas claims, he has established cause to
11 overcome the default by demonstrating ineffective assistance of
12 post-conviction counsel, an independent constitutional
13 violation.

14 **II Analysis**

15 **A. Exhaustion**

16 Section 2254 prevents the District Court from granting
17 federal habeas relief based on a claim that the petitioner's
18 federal constitutional rights were violated if the claim was not
19 "exhausted" in the state courts. See 28 U.S.C. § 2254(b)(1)(A)
20 (2003 & Supp. 2008); O'Sullivan v. Boerckel, 526 U.S. 838, 842,
21 119 S. Ct. 1728, 1731 (1999); Rose v. Palmateer, 395 F.3d 1108,

22
23 ⁴ Adopting this argument would mean that every Arizona
24 defendant could, as a matter of right which they do not now possess,
25 bring a second Rule 32 action asserting their post-conviction counsel
26 was constitutionally ineffective. By this means every defendant could
27 raise the issue of the effectiveness of their trial counsel for the
28 first time in a second Rule 32 action, the non-pleading defendant's
third avenue of review, because it would be necessary to undertake an
analysis of the validity of the ineffective assistance of trial
counsel claim to determine if post-conviction counsel's performance
was deficient for failing to raise the claim.

1 1110 (9th Cir. 2005). "We may not consider any federal-law
2 challenge to a state-court decision unless the federal claim was
3 either addressed by or properly presented to the state court
4 that rendered the decision we have been asked to review." Cook
5 v. Schriro, 538 F.3d 1000, 2008 WL 3484870, at *16 (9th Cir.),
6 quoting Howell v. Mississippi, 543 U.S. 440, 443, 125 S. Ct.
7 856, 858 (2005). To properly exhaust a federal habeas claim the
8 petitioner must afford the state the opportunity to rule upon
9 the merits of the claim by "fairly presenting" the claim to the
10 state's "highest" court in a procedurally correct manner. See,
11 e.g., Duncan v. Henry, 513 U.S. 364, 365, 115 S. Ct. 887, 887-88
12 (1995); Rose, 395 F.3d at 1110.

13 **B. Procedural default**

14 A federal habeas petitioner has not exhausted a federal
15 habeas claim if he still has the right to raise the claim "by
16 any available procedure" in the state courts. 28 U.S.C. §
17 2254(c) (2003 & Supp. 2008). Because the exhaustion requirement
18 refers only to remedies still available to the petitioner at the
19 time they file their action for federal habeas relief, it is
20 satisfied if the petitioner is procedurally barred from pursuing
21 their claim in the state courts. See Woodford v. Ngo, 541 U.S.
22 81, 126 S. Ct. 2378, 2387 (2006); Castille v. Peoples, 489 U.S.
23 346, 351, 109 S. Ct. 1056, 1060 (1989).

24 Accordingly, if it is clear the habeas petitioner's
25 claim is procedurally barred pursuant to state law, the claim is
26 exhausted by virtue of the petitioner's "procedural default" of
27 the claim. See, e.g., Woodford, 541 U.S. at 92-93, 126 S. Ct.

1 at 2387. Procedural default occurs when a petitioner has never
2 presented a federal habeas claim in state court and is now
3 barred from doing so by the state's procedural rules, including
4 rules regarding waiver and the preclusion of claims. See
5 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060; Johnson v.
6 Lewis, 929 F.2d 460, 462 (9th Cir. 1991). Procedural default
7 also occurs when a petitioner did present a claim to the state
8 courts, but the state courts did not address the merits of the
9 claim because the petitioner failed to follow a state procedural
10 rule, including rules regarding waiver and the preclusion of
11 claims. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797, 802, 111
12 S. Ct. 2590, 2594-95 (1991); Coleman v. Thompson, 501 U.S. 722,
13 727-28, 111 S. Ct. 2546, 2553-57 (1991); Ellis v. Armenakis, 222
14 F.3d 627, 632 (9th Cir. 2000); Szabo v. Walls, 313 F.3d 392, 395
15 (7th Cir. 2002).

16 However, the state procedural bar providing for the
17 exhaustion of a habeas claim is also an adequate and independent
18 state law basis for a federal court to deny review of the merits
19 of a petitioner's claims for federal habeas relief. "A federal
20 court is precluded from reviewing the merits of a claim when the
21 state court has denied relief on the basis of an independent and
22 adequate state procedural default." Cooper v. Brown, 510 F.3d
23 870, 924 (9th Cir. 2007). If the District Court finds there is
24 an independent and adequate state procedural ground barring a
25 state court from hearing the merits of a petitioner's claims,
26 "federal habeas review [on those claims] is barred unless the
27 [petitioner] can demonstrate cause for the procedural default

1 and actual prejudice, or demonstrate that the failure to
2 consider the claims will result in a fundamental miscarriage of
3 justice." Noltie v. Peterson, 9 F.3d 802, 804-05 (9th Cir.
4 1993). See also Park v. California, 202 F.3d 1146, 1150 (9th
5 Cir. 2000). "If a prisoner has defaulted a state claim by
6 'violating a state procedural rule which would constitute
7 adequate and independent grounds to bar direct review ... he may
8 not raise the claim in federal habeas, absent a showing of cause
9 and prejudice or actual innocence.'" Ellis, 222 F.3d at 632,
10 quoting Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir. 1994).

11 Federal courts hearing habeas petitions may
12 not review state convictions, even for
13 federal constitutional claims, if the state
14 court judgment procedurally barring the
15 petitioner's claims rests on an independent
16 and adequate state law ground. []. Procedural
17 default, a particular type of adequate and
18 independent state ground, applies to bar
19 federal habeas review when the state court
20 has declined to address the petitioner's
21 federal claims because he failed to meet
22 state procedural requirements...

23 Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005)
24 (internal citations and quotations omitted).

25 "For the procedural default rule to apply, however, the
26 application of the state procedural rule must provide 'an
27 adequate and independent state law basis' on which the state
28 court can deny relief." Park, 202 F.3d at 1151, quoting
Coleman, 501 U.S. at 729-30, 111 S. Ct. at 2553-54.
Accordingly, only a "firmly established and regularly followed
state practice" may be interposed by a state to prevent habeas
review of the merits of a federal constitutional claim. Ford v.

1 Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850, 857 (1991); James
2 v. Kentucky, 466 U.S. 341, 48-51, 104 S. Ct. 1830, 1835-37
3 (1984); Collier v. Bayer, 408 F.3d 1279, 1283-84 (9th Cir.
4 2005). The United States Supreme Court has affirmed that the
5 Arizona state courts' application of Rule 32.2, Arizona Rules of
6 Criminal Procedure, precluding the post-conviction review of
7 issues if the defendant could have but failed to present them at
8 an earlier proceeding, is a firmly established and regularly
9 followed state practice. See Stewart v. Smith, 536 U.S. 856,
10 860, 122 S. Ct. 2578, 2581 (2002). See also Cook, 2008 WL
11 3484870, at *17; Ortiz v. Stewart, 149 F.3d 923, 931-32 (9th
12 Cir. 1998); Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir.
13 1992).⁵

14 If the state raises the existence of an independent and
15 adequate state procedural ground as a defense to relief on the

16 _____
17 ⁵In a decision published only in the Federal Appendix, the
18 Ninth Circuit stated:

19 We have previously held that "Arizona's
20 procedural rules are consistently and regularly
21 followed and are adequate to bar federal review."

22 Poland, 169 F.3d at 585. Generally, State rules
23 are deemed inadequate if they are either
24 "selectively applied to bar the claims of certain
25 litigants" or "unsettled due to ambiguous or
26 changing state authority." Wood v. Hall, 130
27 F.3d 373, 377 (9th Cir. 1997)....

28 Arizona has not made application of this
procedural bar dependent on an antecedent federal
ruling, such as the determination of
constitutional error. See Carter v. Giurbino,
385 F.3d 1194, 1197-98 (9th Cir. 2004) (finding
independence of procedural default because state
courts "reject sufficiency of the evidence claims
as non-cognizable habeas claims ... solely as a
matter of state law")....

Quintero v. Stewart, 121 Fed. App. 203, 206 (2005).

1 merits of a habeas petitioner's claims, the petitioner must
2 raise "specific factual allegations that demonstrate the
3 inadequacy of the state procedure, including citation to
4 authority demonstrating inconsistent application of the rule,"
5 to avoid a finding that the rule is an adequate and independent
6 bar to habeas relief. Bennett v. Mueller, 322 F.3d 573, 584 &
7 586 (9th Cir. 2003), quoting Hooks v. Ward, 184 F.3d 1206, 1217
8 (10th Cir. 1999). Otherwise, the petitioner must establish
9 cause and actual prejudice to avoid imposition of the procedural
10 bar to relief on the merits of his claims. See Rich v.
11 Calderon, 187 F.3d 1064, 1066 (9th Cir. 1999).

12 **C. Cause and prejudice**

13 Federal habeas relief based on a procedurally defaulted
14 claim is barred unless the petitioner can demonstrate a
15 fundamental miscarriage of justice will occur if the Court does
16 not consider the merits of the claim, or cause and actual
17 prejudice to excuse their default of the claim. See House v.
18 Bell, 547 U.S. 518, 126 S. Ct. 2064, 2076 (2006); Dretke v.
19 Haley, 541 U.S. 386, 392-93, 124 S. Ct. 1827, 1852 (2004).

20 "Cause" is a legitimate excuse for the petitioner's
21 procedural default of the claim and "prejudice" is actual harm
22 resulting from the alleged constitutional violation. See Thomas
23 v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991). To demonstrate
24 cause, a petitioner must show the existence of some external
25 factor which impeded his efforts to comply with the state's
26 procedural rules. See Vickers v. Stewart, 144 F.3d 613, 617
27 (9th Cir. 1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305

1 (9th Cir. 1996). To establish prejudice, the petitioner must
2 show that the underlying alleged constitutional error worked to
3 his actual and substantial disadvantage, infecting his entire
4 trial with constitutional violations. See Vickers, 144 F.3d at
5 617; Correll v. Stewart, 137 F.3d 1404, 1415-16 (9th Cir. 1998).
6 Establishing prejudice requires a petitioner to prove that, "but
7 for" the alleged constitutional violations, there is a
8 reasonable probability he would not have been convicted of the
9 same crimes. See Manning v. Foster, 224 F.3d 1129, 1135-36 (9th
10 Cir. 2000); Ivy v. Caspari, 173 F.3d 1136, 1141 (8th Cir. 1999).
11 Although both cause and prejudice must be shown to excuse a
12 procedural default, the Court need not examine the existence of
13 prejudice if the petitioner fails to establish cause. See Engle
14 v. Isaac, 456 U.S. 107, 134 n.43, 102 S. Ct. 1558, 1575 n.43
15 (1982); Thomas, 945 F.2d at 1123 n.10.

16 Allegedly ineffective assistance of counsel does not
17 establish cause for the failure to properly exhaust a habeas
18 claim in the state court unless the specific Sixth Amendment
19 claim providing the basis for cause was itself properly
20 exhausted in the state courts. See Edwards v. Carpenter, 529
21 U.S. 446, 451, 120 S. Ct. 1587, 1591 (2000). Additionally,
22 "[a]ttorney error does not constitute cause to excuse a
23 procedural default unless counsel's performance was
24 constitutionally deficient." Deitz v. Money, 391 F.3d 804, 809
25 (6th Cir. 2004). See also Coleman, 501 U.S. at 755, 111 S. Ct.
26 at 2567 ("We reiterate that counsel's ineffectiveness will
27 constitute cause only if it is an independent constitutional

1 violation").

2 **III Analysis of Respondents' allegation that**
3 **Petitioner's claims are procedurally barred**

4 In denying Petitioner's second action for state post-
5 conviction relief,⁶ after "having considered the arguments of
6 counsel," the state Superior Court concluded "that all issues
7 identified by counsel could have been raised in the original PCR
8 and [] are therefore precluded..." Answer, Exh. N at 4. The
9 Superior Court also addressed the merits of Petitioner's
10 ineffective assistance of counsel claims. The state Superior
11 Court summarized Petitioner's ineffective assistance of trial
12 counsel claims as arguing counsel "was incompetent because he
13 did not properly prepare for and did not present certain
14 evidence at trial; and he did not prevent certain evidence from
15 being admitted during the trial; and Appellate/Post Conviction
16 Relief counsel was incompetent because she failed to raise the
17 issues noted above." *Id.*, Exh. N at 2.

18 The Superior Court noted its review of the record and
19 the fact that it presided over the trial and concluded:

20 [Petitioner's] counsel's arguments do not
21 raise a colorable claim of ineffective
22 assistance of trial counsel, and, in any
23 event, that claim is precluded;
24 Counsel's arguments do not raise a colorable
claim of ineffective assistance of
appellate/Post Conviction Relief [counsel]
and, in any event, the claim lacks any merit;
Counsel failed to raise the one issue that

25
26 ⁶As noted *supra*, Petitioner's first state action for post-
conviction relief was dismissed after his counsel stated she could
27 find no meritorious claims to raise on his behalf and Petitioner did
not file a pro se brief asserting any claims.

1 trial counsel had very limited options
2 available to him to deal with the issue of
3 semen on the victim's nightgown. He did a
4 credible job suggesting the victim's mother
5 wore the nightgown or that the semen got on
6 the nightgown when the victim climbed into
7 her mom's bed or when she changed clothes in
8 the bathroom.

9 Id., Exh. N at 3.

10 The Superior Court decided that, "[e]ven were this
11 Court inclined to do so, this Court cannot find that if trial
12 counsel had done everything suggested by counsel in this Post
13 Conviction Relief, the result would have changed." Id., Exh. N
14 at 3. Citing Strickland v. Washington, the Superior Court
15 determined that, because trial counsel's performance was not
16 deficient nor prejudicial, appellate and post-conviction relief
17 counsel's failure to raise the issue was not deficient
18 performance nor prejudicial. Id., Exh. N at 4. Accordingly,
19 the state court concluded Petitioner had not raised a colorable
20 claim of ineffective assistance of trial or appellate or post-
21 conviction counsel.

22 The Arizona Court of Appeals granted review of this
23 decision and denied relief without discussing the merits of
24 Petitioner's ineffective assistance of trial counsel claims.
25 The Arizona Court of Appeals concluded the Superior Court did
26 not abuse its discretion by ruling Petitioner's ineffective
27 assistance of trial counsel claims were precluded by his failure
28 to raise them in his first Rule 32 action. Id., Exh. R at 2.
Distinguishing Halbert, the appellate court disagreed with
Petitioner's assertion that his ineffective assistance of trial

1 counsel claims were not precluded because his first post-
2 conviction counsel's performance was allegedly defective for
3 failing to raise them in that action. Id., Exh. R at 2. The
4 appellate court stated that Petitioner did not have a
5 constitutional right to the effective assistance of post-
6 conviction counsel. Id., Exh. R at 2.

7 A state court's application of a procedural rule, i.e.,
8 the Arizona courts' application of Rule 32.2, Arizona Rule of
9 Criminal Procedure governing the waiver and preclusion of
10 claims,⁷ is not undermined if the state court simultaneously
11 rejects the merits of the defendant's constitutional claim. See
12 Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 1044
13 n.10 (1989); Bennett, 322 F.3d at 580; Carriger, 971 F.2d at
14 333. Unless a state court's decision finding a claim

15
16 7

17 An Arizona state prisoner may obtain collateral
18 review of any federal constitutional claim in the
19 Arizona state courts pursuant to Rule 32.1 of the
20 Arizona Rules of Criminal Procedure. Under Rule
21 32.2(a) such review is barred, however, if (1)
22 the issues are still raisable on direct appeal or
23 on a post-trial motion, (2) they have been
24 finally adjudicated on the merits on appeal or in
25 a previous collateral proceeding, or (3) they
26 were "knowingly, voluntarily and intelligently
27 not raised at trial, on appeal, or in any
28 previous collateral proceeding." Subsection (c)
of Rule 32.2 provides that

[t]he court may infer from the petitioner's
failure to raise an issue on appeal after being
advised by the sentencing judge of the necessity
that he do so, or his failure to raise any ground
then available to him in a previous Rule 32
proceeding in which he was represented by
counsel, that he knowingly, voluntarily and
intentionally relinquished the right to do so.

Johnson v. Lewis, 929 F.2d 460, 463 (9th Cir. 1991).

1 procedurally barred "fairly appears" to rest primarily upon
2 federal law, the District Court should not assume that the state
3 judgment failed to rely exclusively on its own sovereign
4 principles. See Coleman, 501 U.S. at 737, 111 S. Ct. at 2558;
5 Bennett, 322 F.3d at 580. A state decision adequately rests on
6 a state-law basis when the state court "explicitly" invokes a
7 state procedural rule as a separate basis for its decision
8 denying relief and the state court did not make application of
9 the procedural bar depend on an antecedent ruling on federal
10 law. See Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003).
11 See also Cooper, 510 F.3d at 924; Bennett, 322 F.3d at 580;
12 Park, 202 F.3d at 1152.⁸

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14 [The] AEDPA, [] precludes us from granting a
15 state habeas petition "with respect to any claim
16 that was adjudicated on the merits in State court
17 proceedings" unless the state's adjudication of
18 the claim meets certain criteria. [] We have
19 held that "a state has 'adjudicated' a
20 petitioner's constitutional claim 'on the merits'
21 for purposes of § 2254(d) when it has decided the
22 petitioner's right to post conviction relief on
23 the basis of the substance of the constitutional
24 claim advanced, rather than denying the claim on
25 the basis of a procedural or other rule
26 precluding state court review of the merits." []
27 Where, as here, no state court considered [the
28 petitioner's] claim on the merits, § 2254(d) is
simply inapplicable.

... Because the state courts never adjudicated
[the petitioner's] constitutional claim on the
merits, but rejected it on procedural grounds,
the better course is to decline to address [the]
procedurally-barred claim. See Windham v. Merkle,
163 F.3d 1092, 1101 (9th Cir. 1998). However, if
the majority insists on reaching the issue, AEDPA
is inapplicable, and our precedent requires de
novo review.

Medley v. Runnels, 506 F.3d 857, 870 (9th Cir. 2007) (Ikuta, J.,
dissenting) (some internal citations omitted).

1 counsel. At that time, Petitioner's direct appeal had been
2 stayed and his appointed counsel could have raised any issue
3 regarding insufficient evidence or the improper admission of
4 evidence. Even if properly exhausted as a separate claim in the
5 state courts, which is arguable, Petitioner's post-conviction
6 counsel's performance was not unconstitutionally deficient nor
7 prejudicial; the state court concluded the ineffective
8 assistance of trial counsel claim raised by Petitioner would
9 have failed on the merits. Because Petitioner was not deprived
10 of any right to post-conviction counsel or an arguable right to
11 the effective assistance of post-conviction counsel,⁹ his
12 allegation of ineffective assistance of post-conviction counsel
13 does not constitute cause for Petitioner's procedural default of
14 his ineffective assistance of trial counsel claim.

15 **IV Fundamental miscarriage of justice**

16 Absent a showing of cause and prejudice, review of the
17 merits of procedurally defaulted habeas claims is appropriate if
18 the petitioner demonstrates review of the merits of his claims
19 is necessary to prevent a fundamental miscarriage of justice.
20 See Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867

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22 ⁹ Petitioner's post-conviction counsel's performance could
23 arguably constitute cause for his procedural default of his claim that
24 his trial counsel was ineffective if post-conviction counsel's
25 performance was defective and Petitioner was prejudiced by the
26 deficiency. See Cook, 2008 WL 3484870, at *18. However, to succeed
27 on an assertion his post-conviction counsel's performance was
28 deficient because counsel failed to raise a particular argument, the
petitioner must establish the argument was likely to be successful,
thereby establishing that he was prejudiced by his counsel's omission.
See Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir.), cert. denied,
128 S. Ct. 722 (2007); Weaver v. Palmateer, 455 F.3d 958, 970 (9th
Cir. 2006), cert. denied, 128 S. Ct. 177 (2007).

1 (1995); Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct.
2 2639, 2649 (1986). A fundamental miscarriage of justice occurs
3 when a constitutional violation has probably resulted in the
4 conviction of one who is actually innocent. See Schlup, 513
5 U.S. at 326-27, 115 S. Ct. at 867 (concluding the "probably
6 resulted" standard rather than the more stringent "clear and
7 convincing" standard must be applied); Murray, 477 U.S. at 485-
8 86, 106 S. Ct. at 2649; Thomas v. Goldsmith, 979 F.2d 746, 749
9 (9th Cir. 1992) (showing of factual innocence is necessary to
10 trigger manifest injustice relief).

11 To satisfy the "fundamental miscarriage of justice"
12 standard, Petitioner must establish it is more likely than not
13 that no reasonable juror could have found him guilty of the
14 offenses. Schlup, 513 U.S. at 327, 115 S. Ct. at 867;¹⁰ Wildman
15 v. Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001). To be
16 entitled to consideration of his defaulted habeas claims of
17 constitutional error Petitioner must present a colorable showing
18 of factual innocence. See Herrera v. Collins, 506 U.S. 390,
19 404, 113 S. Ct. 853, 862 (1993) (applying a very high standard
20 of review to a claim of actual innocence on habeas review
21 because the reviewing court assumed the trial was free of

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23 ¹⁰ The Supreme Court stated in Schlup:
24 [I]f a petitioner [] presents evidence of
25 innocence so strong that a court cannot have
26 confidence in the outcome of the trial unless the
27 court is also satisfied that the trial was free
28 of nonharmless constitutional error, the
petitioner should be allowed to pass through the
gateway and argue the merits of his underlying
claims.

27 513 U.S. at 316, 115 S. Ct at 861.

28

1 constitutional error). If Petitioner does not present
2 supplementary post-trial evidence establishing he is factually
3 innocent, he may not avoid the procedural bar to consideration
4 of the merits of his habeas claims; a claim of factual innocence
5 is not a claim of constitutional error. See Schlup, 513 U.S. at
6 315, 115 S. Ct. at 861; Coley v. Gonzales, 55 F.3d 1385, 1387
7 (9th Cir. 1995).¹¹

8 The Supreme Court has recognized that any "actual
9 innocence" exception to a procedural bar to consideration of
10 federal habeas claims is concerned with actual, as opposed to
11 legal, innocence. See Bousley v. United States, 523 U.S. 614,
12 623, 118 S. Ct. 1604, 1611 (1998); Schlup, 513 U.S. at 324, 115
13 S. Ct. at 865. To satisfy the Schlup standard, a petitioner
14 must show that, in light of all the evidence, including new
15 evidence, it is more likely than not that no reasonable juror
16 would have found petitioner guilty beyond a reasonable doubt.
17 See Cooper, 358 F.3d at 1119. A finding that a petitioner has
18 presented sufficient evidence of his "actual innocence" must be

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20 ¹¹ Even if Petitioner can establish his trial included a
21 constitutional violation, i.e., ineffective assistance of counsel,
22 without "new" evidence of his actual innocence, the violation is not
23 a "miscarriage of justice" because the violation did not result in the
24 conviction of one who is "actually innocent." Conversely, before the
25 Court may excuse Petitioner's procedural error based on the conclusion
26 Petitioner was subjected to a "miscarriage of justice," Petitioner
27 must make a showing that, not only is he factually innocent, but that
28 his trial included constitutional error, i.e., ineffective assistance
of counsel. See Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851 (1995).
In Schlup, the Supreme Court did not reach the merits of the
petitioner's constitutional claims because it concluded the lower
court erred by not applying the standard stated in Murray v. Carrier
to the petitioner's claim that his actual innocence overcame his
procedural default of his habeas claims.

1 based on "new," reliable evidence not presented at trial. See
2 Schlup, 513 U.S. at 324-25, 866.

3 To be credible, a claim of actual innocence
4 must be based on reliable evidence not
5 presented at trial. Given the rarity of such
6 evidence, *in virtually every case, the
7 allegation of actual innocence has been
8 summarily rejected.*

9 Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1502-
10 03 (1998) (emphasis added).

11 Petitioner has not presented supplementary post-trial
12 reliable evidence establishing his is factually innocent. See
13 Scott v. Lavan, 190 Fed. App. 196, 198 (3d Cir. 2006); Sibley v.
14 Culliver, 377 F.3d 1196, 1206 (11th Cir. 2004). Petitioner has
15 not presented new evidence which, when considered with the
16 evidence offered at trial, establishes that no reasonable juror
17 could have found him guilty. Compare House, 547 U.S. at 537-53,
18 126 S. Ct. at 2077 (holding that the Schlup standard was
19 satisfied where new DNA evidence disproved the prime murder
20 motive of sexual assault, significant issues existed with the
21 collection of other forensic evidence, and new evidence existed
22 that the victim's husband may have confessed to the crime).

23 Furthermore, Petitioner has not supported his
24 allegations of constitutional error with new reliable evidence,
25 i.e., exculpatory scientific evidence, trustworthy eyewitness
26 accounts, or critical physical evidence, that was not presented
27 at trial, which would establish his actual innocence. See
28 Schlup, 513 U.S. at 324, 115 S. Ct. at 865.

1 "strategic choices made after thorough investigation of law and
2 facts relevant to plausible options are virtually
3 unchallengeable...." Id., 466 U.S. at 690-91, 104 S. Ct. at
4 2066.

5 To succeed on this claim Petitioner must demonstrate
6 his trial counsel's errors rendered the result unreliable or the
7 trial fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364,
8 372, 113 S. Ct. 838, 844 (1993); Strickland, 466 U.S. at 694,
9 104 S. Ct. at 2068. Review of counsel's performance is "highly
10 deferential" and there is a "strong presumption" that counsel
11 rendered adequate assistance and exercised reasonable
12 professional judgment. See Strickland, 466 U.S. at 690, 104 S.
13 Ct. 2052. Petitioner must prove both elements of his Strickland
14 claim, i.e., both deficient performance and prejudice, to be
15 awarded federal habeas relief on this basis. See, e.g., Cooper,
16 510 F.3d at 925.

17 Petitioner's assertions of error by trial counsel
18 involve counsel's alleged failure to present evidence of the
19 victim's inconsistent statements and recantation of her original
20 claim of abuse. The state court found and the undersigned
21 agrees that the decision by counsel to not introduce this
22 evidence was neither deficient nor prejudicial because further
23 impeachment evidence would have been cumulative, given that the
24 victim's testimony itself was vague and contradictory and the
25 fact that she recanted her allegations on the witness stand.
26 Furthermore, other testimony was introduced of the victim's
27 recantations, including her second forensic interview and the

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1 testimony of her grandmother and mother. The jury obviously
2 found the initial video-taped interview of the victim's
3 statement, in addition to the limited physical evidence, to be
4 believable notwithstanding all of the testimony and evidence of
5 recantation. The jury was also presented with evidence
6 regarding the victim's potential motives for allegedly falsely
7 accusing Petitioner including the effective cross-examination of
8 the state's expert and, accordingly, counsel's "failure" to call
9 another expert was not deficient performance nor has Petitioner
10 established that any such error was prejudicial.

11 **VI Conclusion**

12 Petitioner's claim that he was denied his Sixth
13 Amendment right to the effective assistance of trial counsel is
14 procedurally barred because the claim was not properly exhausted
15 in the state courts and Petitioner has not shown cause for, nor
16 prejudice arising from, his procedural default of a Sixth
17 Amendment claim. Petitioner has not shown that review of the
18 merits of his claim is necessary to prevent a fundamental
19 miscarriage of justice or that he is factually innocent of the
20 crimes of conviction.

21 Alternatively, should the Court conclude that the state
22 court's decision was based on the merits of Petitioner's
23 ineffective assistance of trial counsel claims rather than an
24 adequate and independent state procedural bar, or if the Court
25 concludes that Petitioner has shown cause for his procedural
26 default of his ineffective assistance of trial counsel claim,
27 the claim may be denied on the merits.

DATED this 16th day of September, 2008.

Mark E. Aspey

Mark E. Aspey
United States Magistrate Judge

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