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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KENNETH CRAIG DUNCAN,)	
)	
Petitioner,)	
)	
v.)	CIV 08-01321 PHX NVW (MEA)
)	
DORA SCHRIRO and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE NEIL V. WAKE:

On or about July 17, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Petitioner filed an amended petition on September 3, 2008. See Docket No. 10. Respondents filed an answer ("Answer") (Docket No. 19) to the petition on January 20, 2009. Petitioner filed a reply (Docket No. 29) to the answer on April 30, 2009.

I Procedural History

In 2000 a jury found Petitioner guilty on 32 felony counts comprised of sexual activity with a minor younger than 15 years of age and possession of child pornography. See Answer, Exh. A. The charges involved four separate victims. Id., Exh. A. Petitioner was sentenced to concurrent and consecutive

1 prison terms for these offenses totaling in excess of his
2 natural life. Id., Exh. A. These convictions and sentences
3 were reversed on direct appeal in a decision issued November 19,
4 2002. Id., Exh. A. The state appellate court remanded the case
5 for a new trial on the charges. Id., Exh. D.

6 Prior to the occurrence of the second trial, the
7 parties requested a settlement conference pursuant to Rule 17.4,
8 Arizona Rules of Criminal Procedure, which request was granted
9 by the trial court. Id., Exh. B & Exh. C. At the request of
10 the parties, the trial judge, Judge O'Toole, participated in the
11 settlement conference. See id., Exh. C.

12 Petitioner entered into a written plea agreement with
13 the state on July 8, 2004. Id., Exh. B. The plea agreement
14 required Petitioner to plead guilty to four counts of attempted
15 child molestation. Id., Exh. B. The plea agreement provided
16 Petitioner would be sentenced pursuant to the Arizona statute
17 regarding dangerous crimes against children. The written plea
18 agreement stipulated Petitioner would receive the presumptive
19 sentence of ten years imprisonment on one of the convictions and
20 that he would receive a sentence of lifetime probation on the
21 other three convictions. See id., Exh. B & Exh. C & Exh. D.

22 At a consolidated change-of-plea and sentencing hearing
23 conducted July 8, 2004, the trial court questioned Petitioner
24 regarding his understanding of the written plea agreement. Id.,
25 Exh. B at 4-14. Petitioner affirmed he fully understood the
26 plea agreement. Id., Exh. B at 4-7. Petitioner indicated he
27 was satisfied with his counsel's representation. Id., Exh. B at

1 6-7. Petitioner indicated he understood the rights he was
2 waiving, including his right to a jury trial, and confirmed that
3 he had two prior felony convictions. Id., Exh. B at 5-7.

4 At that time, Petitioner pled guilty to four counts of
5 attempted child molestation. Petitioner waived his right to the
6 preparation of a new presentence report and the trial court
7 proceeded to sentencing. Id., Exh. B at 15-16. Noting the
8 convictions for which Petitioner was being sentenced were
9 attempted child molestation convictions and "Class 3 felonies,
10 dangerous crimes against children", the state trial court
11 sentenced Petitioner to one term of ten years imprisonment and
12 to three terms of lifetime probation as specified in the plea
13 agreement. Id., Exh. B at 17-18.¹

14 On October 19, 2004, Petitioner initiated a timely
15 action for state post-conviction relief pursuant to Rule 32,
16 Arizona Rules of Criminal Procedure. See id., Exh. E.

17
18 ¹ Rule 17.4, Arizona Rules of Criminal Procedure, provides:
19 ... The parties shall file the agreement with the
20 court, which shall address the defendant
21 personally and determine that he or she
22 understands and agrees to its terms, that the
23 written document contains all the terms of the
24 agreement, and that the plea is entered in
25 conformance with Rules 17.2 and 17.3.
26 ... After making such determinations ... the
27 court shall either accept or reject the tendered
28 negotiated plea. The court shall not be bound by
any provision in the plea agreement regarding the
sentence or the term and conditions of probation
to be imposed, if, after accepting the agreement
and reviewing a presentence report, it rejects
the provision as inappropriate.

1 Petitioner asserted he was entitled to post-conviction relief
2 because his trial counsel was unconstitutionally ineffective.
3 Id., Exh. F. Petitioner also asserted he was denied his right
4 to have a jury determine the "dangerous" nature of his offenses.
5 Id., Exh. F. Petitioner further argued that his sentences
6 violated state law. Id., Exh. F. Additionally, Petitioner
7 alleged the trial judge erred by not specifically referring to
8 Arizona Revised Statutes Annotated § 13-604.01, the statute
9 defining dangerous crimes against children and the presumptive
10 sentencing for such convictions, during the change-of-plea
11 colloquy. Id., Exh. F. Petitioner also argued that his
12 convictions should be reversed because the trial judge's
13 participation in the settlement conference was prohibited by
14 Arizona law, i.e., Rule 17.4, Arizona Rules of Criminal
15 Procedure and the judicial code of ethics. See id., Exh. F.²

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17 Plea Negotiations. The parties may negotiate
18 concerning, and reach an agreement on, any aspect
19 of the case. *At the request of either party, or*
20 *sua sponte, the court may, in its sole*
21 *discretion, participate in settlement discussions*
22 *by directing counsel having the authority to*
23 *settle to participate in a good faith discussion*
24 *with the court regarding a non-trial or non-jury*
25 *trial resolution which conforms to the interests*
26 *of justice. ... The trial judge shall only*
27 *participate in settlement discussions with the*
28 *consent of the parties. In all other cases, the*
discussions shall be before another judge or a
settlement division. If settlement discussions do
not result in an agreement, the case shall be
returned to the trial judge.

Rule 17.4(a), Ariz. R. Crim. P. (emphasis added).

The Rule was amended in 1999 to allow judges to participate
in settlement conferences with the understanding that "all
lawyers--prosecutors and defense counsel alike--will cooperate in the
use of this rule, and that judges will avoid coercive behavior of any

1 The state trial court denied relief in Petitioner's
2 Rule 32 action in a summary decision issued May 8, 2006. Id.,
3 Exh. C. The court noted Petitioner had ceded his non-
4 meritorious ineffective assistance of counsel claims in his
5 reply to the state's response to his Rule 32 petition. Id.,
6 Exh. C. With regard to Petitioner's objection to the trial
7 judge's participation in the settlement conference, the state
8 court concluded: "Based on the Defendant's own counsel
9 requesting that Judge O'Toole conduct the settlement conference
10 and the fact that no trial subsequently occurred, The Court
11 finds that Defendant's argument Rule 17.4(a), Arizona Rules of
12 Criminal Procedure, is misplaced." Id., Exh. C at 1.³

13 Citing Blakely v. Washington, the trial court concluded
14 Petitioner had waived any right to a jury trial regarding the
15 "dangerous" nature of his crimes by pleading guilty and that
16 Petitioner was given the presumptive sentence. The trial court
17 also concluded Petitioner's other sentencing claims were without
18 merit. Id., Exh. C.

19 The Arizona Court of Appeals declined review of the
20 trial court's denial of Rule 32 relief on May 24, 2007. Id.,
21 Exh. I. The Arizona Supreme Court summarily denied review in a
22 decision issued October 11, 2007. Id., Exh. H.

23 Petitioner filed his federal habeas petition on July
24

25 kind". Court comment to 1999 Amendment to Rule 17.4, Ariz. R. Crim.
26 P.

27 ³ The Maricopa County Superior Court judge issuing the
28 opinion was the Honorable A. Craig Blakey II.

1 17, 2008. Petitioner asserts he is entitled to relief because
2 the trial judge erred by participating in the settlement
3 conference. Petitioner maintains he is entitled to relief
4 because his sentences are unlawful under Arizona law, i.e.,
5 because a jury, rather than a judge, was required to find that
6 his crimes were "dangerous crimes against children". Petitioner
7 also contends the trial court erred in failing to expressly
8 refer to Arizona Revised Statutes Annotated § 13-604.01 during
9 the colloquy regarding his entry of a guilty plea.

10 The amended habeas petition cites the Fifth Amendment
11 privilege against self-incrimination, the right to due process
12 of law pursuant to the Fifth and Fourteenth Amendments, a
13 purported Sixth Amendment "right to the adversarial process,"
14 and the right to equal protection. Petitioner alleges the trial
15 court made errors of law violating state statutes and the state
16 and federal rules of criminal procedure.⁴ Petitioner contends
17 he was pressured by his attorney into signing what he believed
18 would be an "Alford plea." Petitioner further asserts the State
19 of Arizona's sentencing scheme regarding dangerous crimes
20 against children is unconstitutional. In his amended petition,
21 Petitioner states: "Duncan does not challenge his guilty plea
22 (conviction) with this petition ... Duncan will challenge his
23 conviction and repudiate his illegally conceived guilty plea in
24 a second Rule 32 [action] to be filed after his July 23, 2008,
25 release from prison." Docket No. 10 at 4.

26
27 ⁴ Petitioner asserts his Fifth Amendment privilege to be
28 free of self-incrimination was violated during his arrest.

1 Respondents allow that the petition is timely filed.
2 Respondents assert that Petitioner did not properly exhaust his
3 federal habeas claims in the state courts. Respondents argue
4 Petitioner's claims regarding the judge's participation in the
5 settlement conference and the court's finding of the "dangerous"
6 elements of his crimes were waived in the state courts and,
7 accordingly, that the claims are procedurally defaulted.
8 Respondents also maintain that Petitioner's other claims fail to
9 state a violation of a federal constitutional right cognizable
10 in a section 2254 action.

11 II Analysis

12 A. Exhaustion and procedural default

13 The District Court may only grant federal habeas relief
14 on the merits of a claim which has been exhausted in the state
15 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.
16 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-
17 30, 111 S. Ct. 2546, 2554-55 (1991). To properly exhaust a
18 federal habeas claim, the petitioner must afford the state the
19 opportunity to rule upon the merits of the claim by "fairly
20 presenting" the claim to the state's "highest" court in a
21 procedurally correct manner. See, e.g., Castille v. Peoples,
22 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose
23 v. Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005).⁵

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25 ⁵ Prior to 1996, the federal courts were required to dismiss
26 a habeas petition which included unexhausted claims for federal habeas
27 relief. However, section 2254 now states: "An application for a writ
28 of habeas corpus may be denied on the merits, notwithstanding the
failure of the applicant to exhaust the remedies available in the
courts of the State." 28 U.S.C. § 2254(b)(2) (1994 & Supp. 2008).

1 Correll v. Stewart, 137 F.3d 1404, 1417 (9th Cir. 1998); Miranda
2 v. Leibach, 394 F.3d 984, 991-92 (7th Cir. 2005). A state
3 court's application of a procedural rule is not undermined where
4 the state court simultaneously rejects the merits of the claim.
5 See, e.g., Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S. Ct.
6 1038, 1044 n.10 (1989).

7 Procedural default occurs when a petitioner has never
8 presented a federal habeas claim in the state courts and is now
9 barred from doing so by the state's procedural rules, including
10 state rules regarding waiver and the preclusion of claims. See
11 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060; Tacho v.
12 Martinez, 862 F.2d 1376, 1378 (9th Cir. 1988). Procedural
13 default also occurs when a petitioner did present a claim to the
14 state courts, but the state courts did not address the merits of
15 the claim because the petitioner failed to follow a state
16 procedural rule. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797,
17 802, 111 S. Ct. 2590, 2594-95 (1991); Coleman, 501 U.S. at 727-
18 28, 111 S. Ct. at 2553-57; Ellis v. Armenakis, 222 F.3d 627, 632
19 (9th Cir. 2000); Szabo v. Walls, 313 F.3d 392, 395 (7th Cir.
20 2002). "If a prisoner has defaulted a state claim by 'violating
21 a state procedural rule which would constitute adequate and
22 independent grounds to bar direct review ... he may not raise
23 the claim in federal habeas, absent a showing of cause and
24 prejudice or actual innocence.'" Ellis, 222 F.3d at 632,
25 quoting Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir. 1994). See
26 also Bennett v. Mueller, 322 F.3d 573, 580-81 (9th Cir. 2003);
27 Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004)

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1 (citations omitted).

2 The District Courts are not to review habeas claims
3 presented to a state court if the decision of that state court
4 denying relief rests on a state ground that is both independent
5 of the federal claim and adequate to support that judgment.
6 See, e.g., Amos v. Scott, 61 F.3d 333, 338 (5th Cir. 1995). The
7 procedural bar doctrine proscribes federal habeas review of a
8 claim when the state court declined to address the petitioner's
9 federal constitutional claim because the petitioner failed to
10 meet a state procedural requirement with regard to the proper
11 exhaustion of the claim in the state courts. See Coleman, 501
12 U.S. at 729-30, 111 S. Ct. at 2553-54; Pitts v. Anderson, 122
13 F.3d 275, 278 (5th Cir. 1997). If the Court finds an
14 independent and adequate state procedural ground precluded
15 relief, "federal habeas review is barred unless the prisoner can
16 demonstrate cause for the procedural default and actual
17 prejudice, or demonstrate that the failure to consider the
18 claims will result in a fundamental miscarriage of justice."
19 Noltie v. Peterson, 9 F.3d 802, 804-05 (9th Cir. 1993).

20 Because the Arizona Rules of Criminal Procedure
21 regarding timeliness, waiver, and the preclusion of claims bar
22 Petitioner from now returning to the state courts to exhaust any
23 unexhausted federal habeas claims, Petitioner has exhausted, but
24 procedurally defaulted, any claim not previously fairly
25 presented to the Arizona courts. See Insyxiengmay v. Morgan,
26 403 F.3d 657, 665 (9th Cir. 2005); Beaty v. Stewart, 303 F.3d
27 975, 987 (9th Cir. 2002). See also Stewart v. Smith, 536 U.S.

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1 856, 860, 122 S. Ct. 2578, 2581 (2002) (holding Arizona's state
2 rules regarding the waiver and procedural default of claims
3 raised in attacks on criminal convictions are adequate and
4 independent state grounds for affirming a conviction and denying
5 federal habeas relief on the grounds of a procedural bar); Ortiz
6 v. Stewart, 149 F.3d 923, 931-32 (9th Cir. 1998).

7 **B. Cause and prejudice**

8 Federal habeas relief based on a procedurally defaulted
9 claim is precluded unless the petitioner can demonstrate a
10 fundamental miscarriage of justice will occur if the Court does
11 not consider the merits of the claim, or cause and actual
12 prejudice to excuse the petitioner's default of the claim. See
13 House v. Bell, 547 U.S. 518, 535-36, 126 S. Ct. 2064, 2076
14 (2006); Dretke v. Haley, 541 U.S. 386, 392-93, 124 S. Ct. 1827,
15 1852 (2004).

16 "Cause" is a legitimate excuse for the petitioner's
17 procedural default of the claim and "prejudice" is actual harm
18 resulting from the alleged constitutional violation. See Thomas
19 v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991). To demonstrate
20 cause, a petitioner must show the existence of some external
21 factor which impeded his efforts to comply with the state's
22 procedural rules. See Vickers v. Stewart, 144 F.3d 613, 617
23 (9th Cir. 1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305
24 (9th Cir. 1996). To establish prejudice, the petitioner must
25 show that the alleged constitutional error worked to his actual
26 and substantial disadvantage, infecting his entire trial with
27 constitutional violations. See Vickers, 144 F.3d at 617;

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

12 **C. Fundamental miscarriage of justice**

13 Review of the merits of a procedurally defaulted habeas
14 claim is required if the petitioner demonstrates review of the
15 merits of the claim is necessary to prevent a fundamental
16 miscarriage of justice. See Dretke, 541 U.S. at 393, 124 S. Ct.
17 at 1852; Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861
18 (1995); Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct.
19 2639, 2649 (1986). A fundamental miscarriage of justice occurs
20 only when a constitutional violation has probably resulted in
21 the conviction of one who is factually innocent. See Murray,
22 477 U.S. at 485-86, 106 S. Ct. at 2649; Thomas v. Goldsmith, 979
23 F.2d 746, 749 (9th Cir. 1992) (showing of factual innocence is
24 necessary to trigger manifest injustice relief). To satisfy the
25 "fundamental miscarriage of justice" standard, a petitioner must
26 establish by clear and convincing evidence that no reasonable
27 fact-finder could have found him guilty of the offenses charged.

1 See Dretke, 541 U.S. at 393, 124 S. Ct. at 1852; Wildman v.
2 Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001).

3 Petitioner does not challenge his convictions in this
4 habeas action, but instead challenges the sentences imposed by
5 the state court. Accordingly, Petitioner has not asserted a
6 fundamental miscarriage of justice will occur absent review of
7 the merits of his claims for relief.

8 **D. Fair presentment**

9 To satisfy the "fair presentment" prong of the
10 exhaustion requirement, the petitioner must present "both the
11 operative facts and the legal principles that control each claim
12 to the state judiciary." Wilson v. Briley, 243 F.3d 325, 327
13 (7th Cir. 2001). See also Kelly v. Small, 315 F.3d 1063, 1066
14 (9th Cir. 2003). In Baldwin v. Reese, the Supreme Court
15 reiterated that the purpose of exhaustion is to give the states
16 the opportunity to pass upon and correct alleged constitutional
17 errors. See 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004).
18 Therefore, if the petitioner did not present the federal habeas
19 claim to the state court as asserting the violation of a
20 specific federal constitutional right, as opposed to violation
21 of a state constitutional right or state law, the federal habeas
22 claim was not "fairly presented" to the state court. See, e.g.,
23 id., 541 U.S. at 33, 124 S. Ct. at 1351; Castillo v. McFadden,
24 399 F.3d 993, 999 (9th Cir. 2005). See also Lopez v. Schriro,
25 491 F.3d 1029, 1040 (9th Cir. 2007) ("a petitioner may provide
26 further facts to support a claim in federal district court, so
27 long as those facts do not fundamentally alter the legal claim

1 already considered by the state courts"), cert. denied, 128 S.
2 Ct. 1227 (2008).

3 For a habeas claim to be considered fairly presented to
4 the state courts as a federal claim, the petitioner must have
5 described both the operative facts and the federal legal theory
6 on which the claim is based to the state courts. See Lounsbury
7 v. Thompson, 374 F.3d 785, 788 (9th Cir. 2004); Kelly, 315 F.3d
8 at 1066. Although a habeas petitioner need not recite "book and
9 verse on the federal constitution" to fairly present a claim to
10 the state courts, Picard v. Connor, 404 U.S. 270, 277-78, 92 S.
11 Ct. 509, 512-13 (1971), they must do more than present the facts
12 necessary to support the federal claim. See Anderson v.
13 Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982).

14 **E. Petitioner's claims for relief**

15 **1. Petitioner asserts he is entitled to relief because**
16 **the trial judge erred by participating in the settlement**
17 **conference.**

18 In his amended habeas petition Petitioner asserts that
19 the trial judge's participation in the settlement conference
20 violated the Arizona Rules of Criminal Procedure, the ABA code
21 of judicial ethics, and Rule 11 of the Federal Rules of Criminal
22 Procedure. Petitioner challenges the "appropriateness" of
23 judicial participation in settlement conferences. With regard
24 to how this participation might have violated his federal
25 constitutional rights, Petitioner implies his right to due
26 process of law was violated because the trial judge's presence
27 at the negotiations was coercive and necessarily rendered his

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1 plea involuntary. Petitioner contends that the trial judge's
2 participation in the settlement conference violated the state
3 and federal rules of criminal procedure, thereby depriving him
4 of his right to due process of law.

5 In his state Rule 32 action Petitioner argued the state
6 trial court's participation in the plea negotiations violated
7 the Arizona Rules of Criminal Procedure, the ABA code governing
8 judicial ethics, and the Federal Rules of Criminal Procedure.
9 Petitioner did not expressly present this claim as one alleging
10 a violation of his federal constitutional right to due process
11 of law. The state trial court determined the claim was
12 precluded as waived because the defense had expressly requested
13 the trial judge's participation in the settlement conference.
14 See Answer, Exh. C. The state court also determined the claim
15 was not colorable because the Arizona Rules of Criminal
16 Procedure were not violated, i.e., the trial judge had not
17 participated in both a settlement negotiation and a trial on the
18 merits. Id., Exh. C.

19 Petitioner did not fairly present a claim in the state
20 courts that his federal constitutional right to due process of
21 law was violated and his plea rendered involuntary because the
22 trial judge participated in the settlement conference. See
23 Galvan v. Alaska Dep't of Corr., 397 F.3d 1198, 1204 (9th Cir.
24 2005). General and conclusory references to "due process" in a
25 state court pleading do not suffice to exhaust a claim that the
26 petitioner's federal constitutional rights were violated. See
27 Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006)

1 (holding that "general appeals to broad constitutional
2 principles, such as due process... and the right to a fair
3 trial" do not constitute fair presentation of a federal claim);
4 Castillo, 399 F.3d at 1000-02 (concluding it is not sufficient
5 to engage in "scattershot citation of federal constitutional
6 provisions" without developing "any articulated federal legal
7 theory..."). Because Petitioner did not fairly present the
8 claim, it is procedurally defaulted. As explained, *infra*,
9 Petitioner has not shown cause for, nor prejudice arising from
10 his procedural default of the claim and, accordingly, relief on
11 the merits of the claim is precluded.

12 Additionally, to the extent this habeas claim is
13 predicated on the assertion that Petitioner's right to due
14 process was violated because the trial court violated a state
15 rule of criminal procedure the claim is not a cognizable basis
16 for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62,
17 67-68, 112 S. Ct. 475, 480 (1991) (holding federal habeas relief
18 is not available for alleged errors in the interpretation or
19 application of state law); Floyd v. Alexander, 148 F.3d 615, 619
20 (6th Cir. 1998). The undersigned also notes that the state rule
21 was not violated because it provides the trial judge may
22 participate in settlement negotiations at the request of the
23 parties and Petitioner's counsel requested Judge O'Toole's
24 participation.

25 Furthermore, Petitioner's right to due process could
26 not be violated by a state judge's violation of the Federal
27 Rules of Criminal Procedure. *See, e.g., McMahon v. Hodges*, 382

1 F.3d 284, 289 n.5 (2d Cir. 2004); Miles v. Dorsey, 61 F.3d 1459,
2 1466 (10th Cir. 1995) (stating that Rule 11, Federal Rules of
3 Criminal Procedure does not apply to state courts and "does not
4 necessarily establish a constitutional prohibition").⁶

5 To the extent Petitioner might have presented the claim
6 as a claim of the violation of a constitutional right, because
7 the state court found the claim procedurally barred, i.e.,
8 precluded as waived pursuant to Arizona state law, the District
9 Court may not grant relief on the claim because the state
10 court's decision declining review of the merits of the due
11 process claim was predicated on an adequate and independent
12 state procedural bar. Any cognizable due process claim would be
13 exhausted but procedurally defaulted based on the independent
14

15 ⁶ A similar argument was rejected by the United States
16 District Court for the District of Arizona and the Ninth Circuit Court
of Appeals, in an unpublished decision.

17 Moore further asserts that the transcript at
18 issue documents the trial judge's allegedly
19 improper participation in plea negotiations and
20 thus reveals the judge's bias and prejudice
21 towards him. To the extent that Moore's judicial
22 bias and prejudice contention is cognizable in
23 federal habeas, see Estelle v. McGuire, 502 U.S.
62, 68-69 (1991) (reemphasizing that "it is not
24 the province of a federal habeas court to
25 reexamine state court determinations on state law
26 questions"), it reflects nothing more than his
dissatisfaction with the trial court judge's
adverse rulings and findings, see Liteky v.
United States, 510 U.S. 540, 553-56 (1994). Mere
dissatisfaction, without any attempt to
reconstruct the alleged collusive dialogue, does
not transform Moore's claim into a constitutional
violation, and the district court properly denied
relief on these issues. See 28 U.S.C. § 2254(d);
Liteky, 510 U.S. at 553-56.

27 Moore v. Gonzalez, 2000 WL 125846, at *1 (9th Cir. 2000).

1 state-ground doctrine. See Correll, 137 F.3d at 1417-18.

2 In his response to the answer to his habeas petition
3 asserting he has procedurally defaulted his claims, Petitioner
4 does not offer the Court a reason for finding cause and
5 prejudice regarding the default of his claims. Instead,
6 Petitioner again asserts that the trial judge's participation in
7 settlement discussions violated Rule 17.4(a), Arizona Rules of
8 Criminal Procedure and that "ABA Standards, state and federal
9 rules of criminal procedure, and state and federal judicial
10 procedure."

11 Petitioner has not shown cause for, nor prejudice
12 arising from his procedural default of his claim regarding the
13 trial judge's participation in the settlement negotiations.
14 Petitioner has not alleged that a fundamental miscarriage of
15 justice will occur absent review of the merits of this claim.
16 Accordingly, the District Court need not consider the merits of
17 this claim.

18 **2. Petitioner maintains the trial court erred by**
19 **failing to expressly refer to Arizona Revised Statutes Annotated**
20 **§ 13-604.01 during the plea colloquy.**

21 A state prisoner may obtain a writ of habeas corpus
22 only upon a showing that he is being held in violation of the
23 Constitution, laws, or treaties of the United States. See 28
24 U.S.C. § 2254(a) (1994 & Supp. 2008); Engle, 456 U.S. at 119,
25 102 S. Ct. at 1567. Federal habeas relief is not available for
26 alleged errors in the interpretation or application of state
27 law, including a state's statutes regarding the imposition of

1 sentence. See Estelle, 502 U.S. at 67-68, 112 S. Ct. at 480;
2 Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985).

3 To the extent that Petitioner asserts his sentence
4 violated his right to due process because it was improper
5 pursuant to Arizona statutory law or the Arizona Rules of
6 Criminal Procedure, Petitioner has not stated a claim for
7 federal habeas relief. See Souch v. Schaivo, 289 F.3d 616, 623
8 (9th Cir. 2002). Although Petitioner asserts that his right to
9 due process was violated because the state allegedly did not
10 follow its sentencing statutes, the characterization of this
11 claim in this fashion does not render it cognizable on federal
12 habeas review. See Cacoperdo v. Demonsthenes, 37 F.3d 504, 507
13 (9th Cir. 1994); Dellinger v. Bowen, 301 F.3d 758, 765 (7th Cir.
14 2002). Because this claim is not cognizable on federal habeas
15 review, Petitioner is not entitled to relief on this claim.

16 **3. Petitioner maintains he is entitled to relief**
17 **because his sentences are unlawful under Arizona law, i.e.,**
18 **because a jury, rather than a judge, was required to find that**
19 **his crimes were "dangerous crimes against children".**

20 Petitioner asserts that his sentence was enhanced based
21 on elements essential to the offense of conviction, i.e., the
22 fact that his victims were under the age of 15, in violation of
23 his constitutional right to an "adversarial process," and his
24 rights to due process and equal protection.

25 Petitioner did not properly exhaust a federal habeas
26 claim that his sentences violated his right to due process or
27 equal protection in the state courts. Petitioner asserted in
28

1 the state courts that his right to have a jury determine the
2 "dangerous" nature of his offenses was violated. The state
3 court determined this claim was procedurally barred, i.e.,
4 precluded as waived, because Petitioner expressly waived his
5 right to a jury trial in the plea agreement. The state trial
6 court also concluded Blakely did not apply to Petitioner's
7 claims regarding the "aggravation" of his sentences because
8 Petitioner was sentenced to the presumptive statutory term.

9 To the extent Petitioner might have presented his third
10 claim for federal habeas relief to the state courts as a claim
11 of the violation of a constitutional right, because the state
12 court found the claim procedurally barred, i.e., precluded as
13 waived pursuant to Arizona state law, the District Court may not
14 grant relief on the claim because the state court's decision
15 declining review of the merits of the due process claim was
16 predicated on an adequate and independent state procedural bar.

17 Additionally, because Petitioner admitted to the facts
18 necessary to establish the predicate for his sentence, and
19 because he was sentenced to the stipulated presumptive term of
20 imprisonment, and because Petitioner admitted to prior
21 convictions, Petitioner's case falls outside the requirements
22 for relief established by Blakely.

23 **III Conclusion**

24 Petitioner did not properly exhaust his federal habeas
25 claims by fairly presenting them to the state courts as federal
26 constitutional claims in a procedurally correct manner.
27 Petitioner has procedurally defaulted the claims and has not

1 shown cause for, nor prejudice arising from, his procedural
2 default of these claims. Because Petitioner has not shown cause
3 for, nor prejudice arising from, his procedural default of these
4 claims, the claims must be denied. Additionally, Petitioner
5 asserts claims which are not cognizable on habeas review because
6 he asserts violations of state procedural law in the context of
7 his plea and sentencing proceedings. Furthermore, the state
8 court's decision denying post-conviction relief rested upon
9 adequate and independent state grounds for denying Petitioner's
10 claims of constitutional violations.

11
12 **IT IS THEREFORE RECOMMENDED** that Mr. Duncan's Amended
13 Petition for Writ of Habeas Corpus be **denied and dismissed with**
14 **prejudice.**

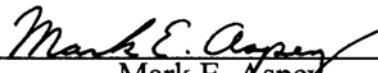
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16 This recommendation is not an order that is immediately
17 appealable to the Ninth Circuit Court of Appeals. Any notice of
18 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
19 Procedure, should not be filed until entry of the district
20 court's judgment.

21 Pursuant to Rule 72(b), Federal Rules of Civil
22 Procedure, the parties shall have ten (10) days from the date of
23 service of a copy of this recommendation within which to file
24 specific written objections with the Court. Thereafter, the
25 parties have ten (10) days within which to file a response to
26 the objections. Pursuant to Rule 7.2, Local Rules of Civil
27 Procedure for the United States District Court for the District

1 of Arizona, objections to the Report and Recommendation may not
2 exceed seventeen (17) pages in length.

3 Failure to timely file objections to any factual or
4 legal determinations of the Magistrate Judge will be considered
5 a waiver of a party's right to de novo appellate consideration
6 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
7 1121 (9th Cir. 2003) (en banc). Failure to timely file
8 objections to any factual or legal determinations of the
9 Magistrate Judge will constitute a waiver of a party's right to
10 appellate review of the findings of fact and conclusions of law
11 in an order or judgment entered pursuant to the recommendation
12 of the Magistrate Judge.

13 DATED this 20th day of May, 2009.

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18 _____
19 Mark E. Aspey
20 United States Magistrate Judge
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