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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Albert E. Lawrence,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

No. CV-10-0173-PHX-PGR (MEA)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Aspey in light of the petitioner’s Objection to Report and Recommendation (Doc. 18), the Court finds that the petitioner’s objections should be overruled and that the Magistrate Judge correctly determined that both claims in the petitioner’s habeas petition, filed pursuant to 28 U.S.C. § 2254, should be denied on their merits.¹

First, the Court agrees with the Magistrate Judge that the petitioner’s first claim, which is that his 39-year sentence amounts to cruel and unusual

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It is undisputed that the petitioner’s federal habeas petition was timely filed and that he properly exhausted both of his federal claims prior to filing his petition.

1 punishment under the Eight Amendment, is meritless. The petitioner, who was
2 29 years old at the time of his crimes, was convicted of three counts of sexual
3 conduct with a developmentally slow fourteen year old girl and was sentenced to
4 a mitigated term of 13 years of imprisonment for each count, with the three
5 sentences to be served consecutively.² In a decision issued on March 13, 2007,
6 the Arizona Court of Appeals determined that the petitioner's three consecutive
7 13-year sentences did not violate the federal or state constitutional rights against
8 cruel and unusual punishment.

9 Under the highly deferential standard of review imposed by the
10 Antiterrorism and Effective Death Penalty Act, this Court may only grant the
11 petitioner habeas relief if the decision of the Arizona Court of Appeals, the last
12 reasoned decision by the Arizona courts regarding the Eighth Amendment issue,
13 was (1) either contrary to or involved an unreasonable application of clearly
14 established law as determined by the United States Supreme Court, or (2) was
15 based on an unreasonable determination of the facts in light of the evidence
16 presented in the state court proceedings. 28 U.S.C. § 2254(d).

17 In order for the Eighth Amendment's narrow proportionality principle to
18 apply the sentence must be grossly disproportionate to the crime. For that
19 reason, proportionality challenges are applicable only in the "exceedingly rare
20 and extreme case." Lockyer v. Andrade, 538 U.S. 63, 73, 123 S.Ct. 1166, 1173
21 (2003) (some internal quotation marks omitted). It was clearly established at the

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24 Under the Arizona Criminal Code, a conviction for having sexual
25 conduct with a minor who is fourteen years old constitutes a dangerous crime
26 against a child and carries a mandatory minimum sentence of 13 years, with the
presumptive sentence being 20 years, and the maximum sentence being 27
years.

1 time of the Arizona Court of Appeals decision in 2007 that courts applying the
2 Eighth Amendment's gross proportionality principle had to objectively measure
3 the severity of the defendant's sentence in light of the crimes he committed.
4 Norris v. Morgan, 622 F.3d 1276, 1287 (9th Cir.2010). It was also then
5 established that a sentence that was not so disproportionate as to be
6 unconstitutional did not become "cruel and unusual" simply because the sentence
7 was mandatory. See United States v. Lyons, 363 Fed.Appx. 485, *486 (9th Cir.
8 2010).

9 In its decision, the Arizona Court of Appeals properly compared the gravity
10 of the petitioner's offenses against the sentences imposed on him and concluded
11 that under the specific circumstances of the case that no inference of gross
12 disproportionality was created. Regardless of whether this Court may think of the
13 propriety of the petitioner's total sentence, the Court cannot conclude that it was
14 objectively unreasonable for the Arizona Court of Appeals to conclude that the
15 petitioner's sentences were not grossly disproportionate to his offenses and prior
16 criminal history.

17 Second, the Court further agrees with the Magistrate Judge that the
18 petitioner's second claim, which is an ineffective assistance of counsel claim, is
19 also meritless. The gist of the claim is that the petitioner did not accept the
20 state's plea offer because his trial counsel failed to adequately explain the terms
21 and benefits of the offered plea agreement in "third grade terms" that he could
22 understand. In the last reasoned state court decision on this issue, which was
23 the state trial court's decision issued on February 12, 2008 denying the
24 petitioner's Rule 32 petition for post-conviction relief, the state court found that
25 the petitioner had failed to establish that his counsel's performance was
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1 ineffective under the standard of Strickland v. Washington, 466 U.S. 668 (1984),
2 because the record established that the petitioner's counsel adequately explained
3 to the petitioner the consequences of accepting the plea agreement as compared
4 with the risks of going to trial, as had the prosecutor and the settlement
5 conference judge and the trial judge, and that the petitioner had indicated that he
6 understood the risks and, against his counsel's advice, had decided to go to trial.

7 The Court concludes that the state trial court's rejection of the petitioner's
8 ineffective assistance claim was neither contrary to nor an unreasonable
9 application of clearly established federal law governing ineffective assistance of
10 counsel claims. The Court further concludes that the state court's decision
11 regarding the plaintiff's understanding of the applicable sentences, which this
12 Court must presume to be correct, Rice v. Collins, 546 U.S. 333, 338-39, 126
13 S.Ct. 969, 974 (2006), was not an unreasonable determination of the facts in light
14 of the evidence presented in the state court. The petitioner has not met his
15 burden of rebutting the state court's factual findings by the required clear and
16 convincing evidence, *id.*; 28 U.S.C. § 2254(e)(1), because, first, the petitioner was
17 intellectually capable of understanding the benefits of the plea offer because the
18 psychological/neuropsychological evaluation of the petitioner submitted to the
19 state court found that the petitioner's level of intellectual functioning was in the
20 low/normal range, and second, even if the petitioner's counsel failed to properly
21 explain the sentencing issues to him, the record establishes that the state court
22 conducted three pre-trial settlement conferences with the petitioner to discuss two
23 different plea offers and that in those conferences the sentencing issues were
24 clearly explained to the petitioner by the judges involved and the prosecutor and
25 the petitioner's sufficiently demonstrated at those conferences his comprehension
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1 of the different potential sentences he might receive if he accepted the plea offer
2 and if he was convicted at trial.

3 The Court further concludes that the petitioner is not entitled to the
4 issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2)
5 because the petitioner has not made a substantial showing of the denial of a
6 constitutional right, and that the petitioner is not entitled to appeal *in forma*
7 *pauperis*. pursuant to Fed.R.App.P. 24(a)(3)(A) because any such appeal would
8 not be taken in good faith given the Court's stated reasons for the dismissal of his
9 petition.

10 Therefore,

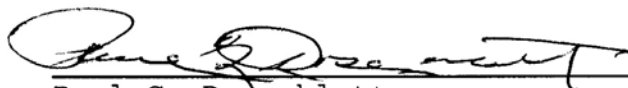
11 IT IS ORDERED that the Magistrate Judge's Report and Recommendation
12 (Doc. 17) is accepted and adopted by the Court.

13 IT IS FURTHER ORDERED that the petitioner's Petition Under 28 U.S.C.
14 § 2254 for a Writ of Habeas Corpus by a Person in State Custody is denied and
15 that this action is dismissed with prejudice.

16 IT IS FURTHER ORDERED that no certificate of appealability shall issue
17 and that the petitioner is not authorized to appeal *in forma pauperis*.

18 IT IS FURTHER ORDERED that the Clerk of the Court shall enter
19 judgment accordingly.

20 DATED this 6th day of January, 2011.

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23 Paul G. Rosenblatt
24 United States District Judge
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