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## IN THE UNITED STATES DISTRICT COURT

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## FOR THE DISTRICT OF ARIZONA

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JEFFREY NOEM VETA,

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Petitioner,

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vs.

No. CV 05-336-TUC-CKJ

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CHUCK RYAN, et al.,

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Respondents.

**ORDER**

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Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254. Respondents have filed an Answer and Petitioner has filed a Reply.

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*Factual and Procedural Background*

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In April, 1996, Petitioner Jeffrey Noem Veta ("Veta") was indicted on thirteen counts including seven counts of sexual conduct with a minor.

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Veta was extradited from Kentucky and arrived in Arizona on February 20, 2002. During an April, 2002, pre-trial conference, Veta's counsel, Larry Rosenthal ("Rosenthal") indicated that Veta did not want to waive any speedy trial rights. However, counsel suggested a trial date in the first or second week of July. Trial was scheduled for July 9, 2002, which was beyond the speedy trial requirements of Ariz.R.Crim.P. 8.3(a) and the Interstate Agreement on Detainers ("IAD"), A.R.S. § 31-481.

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On June 19, 2002, Veta filed a pro se motion to dismiss pursuant to Rule 8.3(a) and 8.6, Ariz.R.Crim.P. On June 20, 2002, Veta filed a pro se motion to dismiss pursuant to

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1 the IAD. The trial court denied the motion, stating that counsel's explicit agreement to  
2 the trial date constituted a waiver or abandonment of Veta's rights under the IAD. Veta  
3 filed a petition for writ of habeas corpus with the Supreme Court of Arizona; that action  
4 was dismissed with instructions to file a petition for special action. Veta then petitioned  
5 for special action to the Court of Appeals of Arizona. The appellate court declined to  
6 accept jurisdiction. The Supreme Court of Arizona denied Veta's Petition for Review.

7 Veta also filed a state habeas corpus petition. The trial court denied relief and Veta  
8 appealed to the Court of Appeals of Arizona. The appellate court affirmed the trial court.  
9 The Supreme Court of Arizona denied Veta's Petition for Review.

10 Trial commenced on April 20, 2004. On May 3, 2004, Veta was found guilty of  
11 continuous child abuse, involving a minor in a drug offense, and two counts of sexual  
12 conduct with a minor under 15. Veta was found not guilty of furnishing obscene or  
13 harmful items to a minor and no verdicts were reached on three counts of sexual conduct  
14 with a minor under fifteen. On July 15, 2004, Veta was sentenced to consecutive,  
15 presumptive 20 year terms of imprisonment on Counts 1, 2, 4, and 5. Veta filed a timely  
16 notice of appeal of the judgment and sentence.

17 On August 20, 2004, Veta filed a Notice of Post-Conviction Relief and, on June  
18 14, 2005, filed a Petition for Post-Conviction Relief raising claims of ineffective  
19 assistance of counsel for failing to assert Veta's speedy trial rights under the IAD and an  
20 illegal sentence pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159  
21 L.Ed.2d 403 (2004). On October 21, 2005, the post-conviction court denied relief. On  
22 September 26, 2007, the Court of Appeals granted review but denied relief. Veta did not  
23 petition for further review and, on October 23, 2007, the Court of Appeals reinstated  
24 Veta's direct appeal.

25 On appeal, Veta asserted (1) the trial court erred in finding that defense counsel  
26 had waived Veta's speedy trial rights under article IV of the IAD; (2) he was not bound  
27 by counsel's agreement to a trial date outside the IAD time limit; (3) the trial court erred  
28 in failing to follow the procedure set out in the IAD, art. IV(c); (4) the State breached its

1 duty to see that the trial court complied with the IAD time limits; (5) the State  
2 “interfered” with defense counsel’s conduct of the defense and violated Veta’s right to  
3 counsel; (6) the trial court erred by giving a jury instruction on the definition of  
4 “hiding” because it was unsupported by the evidence; and (7) the trial court illegally  
5 enhanced his sentences when he allegedly received no notice of any dangerous crimes  
6 against children (DCAC) enhancement in the amended indictment. *See Answer, Ex. I.*

7 On June 30, 2008, the Arizona Court of Appeals affirmed Veta’s convictions and  
8 sentences in a memorandum decision. On July 31, 2008, the Court of Appeals granted  
9 in part Veta’s motion for reconsideration and corrected its June 30, 2008, decision.  
10 Review was denied by the Supreme Court of Arizona and the United States Supreme  
11 Court.

12 Meanwhile, on May 5, 2005, Veta filed a Petition for Writ of Habeas Corpus by  
13 a Person in State Custody Pursuant to 28 U.S.C. § 2254. Following a stay to complete  
14 the state proceedings, Veta filed an Amended Petition under 28 U.S.C. § 2254 for a Writ  
15 of Habeas Corpus by a Person in State Custody. Veta has presented four claims for relief:

16 1. Veta’s Fourteenth Amendment Due Process liberty interest right was  
17 violated when Arizona failed to release him after time limits of Ariz.R.Crim.P. 8.3(a) and  
18 the IAD were exceeded. Veta states this claim in his Traverse as the trial court failed to  
19 release him after an objectively unreasonable determination of waiver.

20 2. Veta’s Sixth and Fourteenth Amendment rights to effective assistance of  
21 counsel was violated when Rosenthal, despite his agreement with Veta not to waive any  
22 of his speedy trial rights and invoking those rights, proposed a time frame outside Veta’s  
23 time limits, effectively waiving Veta’s speedy trial rights. In his Traverse, Veta asserts  
24 that counsel’s conduct effected a waiver and lost Veta his right to dismissal of all charges  
25 with prejudice.

26 3. Veta’s Sixth Amendment Fair Trial protection and Fourteenth Amendment  
27 Due Process right was violated when, over defense objection, the trial court gave a  
28 “hiding” instruction unsupported by the evidence and denied Veta a new trial, contrary

1 to *State v. Noleen* and *Hicks v. Oklahoma*.

2 4. Veta's Sixth and Fourteenth Amendment rights to Notice and Due Process  
3 were violated when he was sentenced under A.R.S. § 13-604.01 after receiving no notice  
4 of "DCAC" enhancement prior to trial in his Amended Indictment, contrary to *State v.*  
5 *Waggoner* and *Hicks v. Oklahoma*.

6 An Answer and Traverse have been filed.

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8 *Statute of Limitations*

9 This Court must review claims consistent with the provisions of the Antiterrorism  
10 and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a state prisoner  
11 must generally file a petition for writ of habeas corpus within one year from the latest of:

- 12 (A) the date on which the judgment became final by the conclusion of direct  
13 review or the expiration of the time for seeking such review;  
14 (B) the date on which the impediment to filing an application created by State  
15 action in violation of the Constitution or laws of the United States is removed, if  
16 the applicant was prevented from filing by such State action;  
17 (C) the date on which the constitutional right asserted was initially recognized by  
18 the Supreme Court, if the right has been newly recognized by the Supreme Court  
19 and made retroactively applicable to cases on collateral review; or  
20 (D) the date on which the factual predicate of the claim or claims presented could  
21 have been discovered through the exercise of due diligence.

22 28 U.S.C. § 2244(d)(1); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005). The Court  
23 has previously determined that Veta's Petition timely filed.

24  
25 *Standard of Review*

26 Federal courts may consider a state prisoner's petition for habeas relief only on the  
27 grounds that the prisoner's confinement violates the Constitution, laws, or treaties of the  
28 United States. *See Reed v. Farley*, 512 U.S. 339, 347, 114 S.Ct. 2291, 2296, 129 L.Ed.2d  
29 271 (1994). Indeed, a habeas corpus petition by a person in state custody:

shall not be granted with respect to any claim that was adjudicated on the merits  
in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable  
application of, clearly established Federal law, as determined by the  
Supreme Court of the United States; or

1 (2) resulted in a decision that was based on an unreasonable determination  
2 of the facts in light of the evidence presented in the State court proceeding.  
3 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495,  
4 1523, 146 L.Ed.2d 389 (2000). General improprieties occurring in state proceedings are  
5 cognizable only if they resulted in fundamental unfairness and consequently violated a  
6 petitioner's Fourteenth Amendment right to due process. *See generally, Estelle v.*  
7 *McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 479, 116 L.Ed.2d 385 (1991).

8 This Court must review claims consistent with the provisions of the AEDPA.  
9 "The Act limits the ability of federal courts to reexamine questions of law and mixed  
10 questions of law and fact." *Jeffries v. Wood*, 114 F.3d 1484, 1498 (9th Cir. 1997).  
11 Indeed, the AEDPA creates "an independent, high standard to meet before a federal court  
12 may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551  
13 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007), *citations omitted*. This Court  
14 may only overturn a state court finding if a petitioner shows by clear and convincing  
15 evidence that the finding was erroneous. *See* 28 U.S.C. § 2254(e)(1). An "unreasonable  
16 application of clearly established law" exists if the state court identified the correct  
17 governing legal principle from Supreme Court decisions but unreasonably applied that  
18 principle to the facts of the case. *See Taylor*.

19 *Exhaustion of State Remedies*

20 Before a federal court may review a petitioner's claims on the merits, a petitioner  
21 must exhaust his state remedies, i.e., have presented in state court every claim raised in  
22 the federal habeas petition. *See Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct.  
23 2546, 115 L.Ed.2d 640 (1991); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct.  
24 1728, 1732, 144 L.Ed.2d 1 (1999) (a state prisoner in a federal habeas action must  
25 exhaust his claims in the state courts "by invoking one complete round of the State's  
26 established appellate review process" before he may submit those claims in a federal  
27 habeas petition); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). Exhaustion  
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1 of state remedies is required in order to give the "State the opportunity to pass upon and  
2 correct alleged violations of its prisoners' federal rights . . . To provide the State with the  
3 necessary opportunity, the prisoner must fairly present his claim in each appropriate state  
4 court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*,  
5 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004), *internal quotation marks*  
6 *and citations omitted*.

7 In Arizona, exhaustion is satisfied if a claim is presented to the Arizona Court of  
8 Appeals. A discretionary petition for review to the Supreme Court of Arizona is not  
9 necessary for purposes of federal exhaustion. *Swoopes*, 196 F.3d at 1010; *State v.*  
10 *Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989) (in non-capital cases, state remedies are  
11 exhausted by review by the court of appeals). A claim is "fairly presented" if the  
12 petitioner has described the operative facts and legal theories on which his claim is based.  
13 *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); *Picard v.*  
14 *Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). In state court, the  
15 petitioner must describe not only the operative facts but also the asserted constitutional  
16 principle. The United States Supreme Court has stated:

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

23 *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995).

24 Respondents acknowledge that each ground raised by Veta in his habeas petition  
25 was previously presented to the state court in Veta's direct appeal or his petition for PCR,  
26 and again in his petitions for review to the state appellate court. Respondents further  
27 acknowledge that Veta asserted a federal law basis for each claim in state court. The  
28 Court finds, therefore, that Veta has exhausted his state court remedies.

1 *Speedy Trial Limits and the IAD*

2 Veta asserts that his Fourteenth Amendment Due Process liberty interest protection  
3 was violated when the State of Arizona failed to release him after the speedy trial limits  
4 of Ariz.R.Crim.P. 8.3(a) and art. IV(c) of the IAD were exceeded. Indeed, Veta asserts  
5 that his due process rights were violated when, after an objectively unreasonable  
6 determination of waiver, the trial court failed to release him.

7 The IAD is a compact entered into by forty-eight states, the District of Columbia,  
8 and the federal government to establish procedures for resolution of one jurisdiction's  
9 outstanding criminal charges against another jurisdiction's prisoner. *See New York v.*  
10 *Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). Insofar as it is “a  
11 congressionally sanctioned interstate compact’ within the Compact Clause of the United  
12 States Constitution, Art I, § 10, cl. 3, the IAD is a federal law subject to federal  
13 construction.” *Id.*, quoting *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401, 87  
14 L.Ed.2d 516 (1985). Federal habeas review of IAD violations is limited, however, to  
15 errors constituting “a fundamental defect which inherently results in a complete  
16 miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair  
17 procedure.” *Reed v. Farley*, 512 U.S. 339, 348, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994),  
18 quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962));  
19 accord *Cross v. Cunningham*, 87 F.3d 586, 587-88 (1st Cir.1996); see also *Hitchcock v.*  
20 *United States*, 580 F.2d 964, 966 (1978) (to state a violation of the IAD cognizable in §  
21 2254 or § 2255 habeas proceedings, the alleged violation must rise to the level of a  
22 “fundamental defect” or have “prejudiced” the rights of the defendant).

23 There is nothing in the record to suggests that the alleged IAD violation constituted  
24 a “fundamental defect” or resulted in a “complete miscarriage of justice.” Veta does not  
25 assert that the alleged IAD violation denied him the opportunity to secure a fair trial,  
26 actually impaired his ability to prepare and present a defense, or to prosecute his appeal.  
27 Rather, Veta asserts that his speedy trial rights were violated because he was not tried in  
28 accordance with the deadlines of the IAD. Absent allegations of prejudice, however, his

1 claims are not cognizable under federal habeas review. *See e.g., Reed v. Farley*, 512  
2 U.S. at 342 (holding that “a state court's failure to observe the 120-day rule of IAD  
3 Article IV(c) is not cognizable under § 2254 when the defendant registered no objection  
4 to the trial date at the time it was set, and suffered no prejudice attributable to the delayed  
5 commencement”); *Reilly v. Warden*, 947 F.2d 43, 44 (2d Cir.) (holding that violations of  
6 the Interstate Agreement on Detainers are not cognizable claims in habeas corpus  
7 petitions under 28 U.S.C. §§ 2254 and 2255), *cert. denied*, 502 U.S. 1115, 112 S.Ct.  
8 1227, 117 L.Ed.2d 462 (1992); *Keeling v. Varner*, No. 99-CV-6565 (JBW), 2003 WL  
9 21919433 at \*5 (E.D.N.Y. June 17, 2003) (holding that absent a showing of prejudice,  
10 petitioner's claim that his speedy trial rights were violated because he was not tried in  
11 accordance with the IAD was not cognizable under federal habeas review) (unpublished),  
12 *aff'd*, 142 Fed. Appx. 506 (2d Cir.2005). The Court finds that Veta’s claim is not  
13 cognizable on federal habeas review.

14  
15 *Speedy Trial Limits, the IAD, and Ineffective Assistance of Counsel*

16 Although the Court has determined that Veta’s claim is not cognizable on habeas  
17 review, the Court considers that, pre-*Reed*, the Ninth Circuit determined that the time  
18 requirements of the IAD “has its roots in the constitutional provision for speedy trial.”  
19 *Carlson v. Hong*, 707 F.2d 367 (9th Cir. 1983) (per curiam). The Ninth Circuit has stated  
20 that the failure of a state court to follow the time requirements of the IAD constitutes a  
21 violation of federal law for § 2254 purposes. *Cody v. Morris*, 623 F.2d 101 (9th Cir.  
22 1980). Because this Court is not aware of any published Ninth Circuit cases addressing  
23 this issue post-*Reed*, the Court finds it appropriate to address Veta’s claim.<sup>1</sup>

24 As previously stated, Veta asserts that his due process rights were violated when  
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26 <sup>1</sup>*See Sun v. Stewart*, 242 F.3d 383 \* 1 (9th Cir. 2000) (unpublished) (*citing Reed* for  
27 the assertion that “a state court’s failure to observe the time periods of the IAD is not  
28 cognizable under § 2254 when defendant ‘registered no objection to the trial date at the time  
it was set, and suffered no prejudice attributable to the delayed commencement”).



1 the State of Arizona failed to release him after the speedy trial limits of Ariz.R.Crim.P.  
2 8.3(a) and art. IV(c) of the IAD were exceeded. Indeed, Veta asserts that his due process  
3 rights were violated when, after an objectively unreasonable determination of waiver, the  
4 trial court failed to release him. Veta also asserts that counsel was ineffective in  
5 proposing a trial date after the expiration of the speedy trial limits, despite counsel's  
6 agreement with Veta not to waive any of his speedy trial rights. Veta asserts that counsel  
7 lost Veta his right to dismissal of all charges with prejudice.

8 In addressing the speedy trial issues raised in Veta's appeal of a petition for writ  
9 of habeas corpus, the Court of Appeals of Arizona stated:

10 As the trial court correctly noted, Veta's habeas corpus petition was simply a  
11 repetition of the arguments he had made in his motion to dismiss. The petition  
12 merely reurged his arguments that Rule 8.3(a) and the IAD mandated dismissal of  
13 the charges – arguments the trial court had previously rejected. Notably, the same  
14 judge who had denied Veta's motions to dismiss also denied his habeas petition.  
15 That judge was familiar with the facts and issues raised in both Veta's motions and  
16 his petition.

14 \* \* \* \* \*

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16 Rule 8.3(a) governs the speedy trial rights of "persons in prison . . . without the  
17 state" but charged with crimes in Arizona. That rule provides:

18 Within 90 days after receipt of a written request from any person charged  
19 with a crime and incarcerated without the state, or within a reasonable time  
20 after otherwise learning of such person's incarceration without the state, the  
21 prosecutor shall take action as required by law to obtain such person's  
22 presence for trial. Within 90 days after the defendant has been delivered  
23 into the temporary custody of the appropriate authority of this state, he or  
24 she shall be brought to trial.

25 As the rule's comment makes clear, "violation of [the] time limit[] is ground for  
26 dismissal of the charges with prejudice under Rule 8.6." Rule 8.6 states: "If the  
27 court determines . . . that a time limit established by Rule[] . . . 8.3(a) . . . has been  
28 violated, it shall on motion of the defendant, or on its own initiative, dismiss the  
prosecution with or without prejudice."

The IAD is "a compact entered into by 48 States, the United States, and the  
District of Columbia to establish procedures for resolution of one State's  
outstanding charges against a prisoner of another State." *Hill*, 528 U.S. at 111,  
120 S.Ct. at 662, 145 L.Ed.2d at 564. "[T]he IAD is a federal law subject to  
federal construction." *Id.* When the charging jurisdiction, pursuant to IAD article  
IV(a), requests temporary custody of a prisoner to resolve pending charges against  
him or her, "trial shall be commenced within one hundred twenty days of the  
arrival of the prisoner in the receiving state." § 31-481, IAD ar. IV(c). If the

1 prisoner is not brought to trial within that time, the IAD requires that the charges  
2 be dismissed with prejudice. *Id.*, IAD art. V(c).

3 In *Hill*, as here, defense counsel agreed to a trial date beyond the time required by  
4 the IAD. Hill later moved to dismiss, arguing the IAD's time limit had expired.  
5 The trial court denied Hill's motion, but the New York Court of Appeals later  
6 reversed his convictions and ordered dismissal of the indictment. The Supreme  
7 Court reversed and held that defense counsel had effectively waived Hill's speedy  
8 trial rights under the IAD.

9 In so holding, the Court first observed "courts have agreed that a defendant may,  
10 at least under some circumstances, waive his right to object to a given delay under  
11 the IAD." 52 U.S. at 114, 120 S.Ct. at 663, 145 L.Ed.2d at 566. At issue in *Hill*,  
12 however, was whether defense counsel's actions could effect such a waiver. In  
13 concluding that they could, the Court reasoned, "As to many decisions pertaining  
14 to the conduct of the trial, the defendant is 'deemed bound by the acts of his  
15 lawyer-agent and is considered to have 'notice of all facts, 'notice of which can  
16 be charged upon the attorney.'" *Id.* at 115, 120 S.Ct. at 664, 145 L.Ed.2d at 567,  
17 quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8  
18 L.Ed.2d 734, 740 (1962), quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955,  
19 958 (1880). The Court concluded that "[s]cheduling matters are plainly among  
20 those for which agreement by counsel generally controls" and that, "[a]bsent a  
21 demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.*;  
22 cf. *State v. Nelson*, 157 Ariz. 187, 188-89, 755 P.2d 1175, 1176-77 (App. 1988)  
23 (defense counsel waived defendant's rights under IAD art. IV(e), the "anti-  
24 shuttling" provision).

25 The trial court did not err in ruling, pursuant to *Hill*, that defense counsel had  
26 effectively waived Veta's speedy trial rights under the IAD by agreeing to a trial  
27 date beyond the IAD's time limit. Similarly, we conclude that defense counsel  
28 also could and did waive Veta's speedy trial rights under Rule 8.3(a).

Although the provisions specify different time limits in which an out-of-state  
prisoner must be tried – 90 days under Rule 8.3(a), and 120 days under the IAD –  
the comment to Rule 8.3(a) states that the rule "is intended primarily to  
supplement the provisions of the [IAD]." Further, our supreme court has stated  
that "Rule 8.3(a) . . . must be read in light of the [IAD]." *State v. Gretzler*, 126  
Ariz. 60, 69, 612 P.2d 1023, 1032 (1980), *overruled in part on other grounds*,  
*State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983). Accordingly, we fail to see  
why an attorney's waiver of the IAD time limit, which the Supreme Court deemed  
valid in *Hill*, would not also serve to waive Rule 8.3(a)'s time limit. Cf. *State v.*  
*Wells*, 638 N.W.2d 456, 461 (Minn.Ct.App. 2002) (defense counsel's agreement  
to delay omnibus hearing under state law beyond IAD's speedy trial time limit  
effectively waived that limit as well).

As noted above, the trial court did not specifically address Veta's Rule 8.3(a)  
arguments in its initial ruling denying Veta's motions to dismiss. Because Veta's  
attorney effectively waived Rule 8.3(a)'s speedy trial time, however, we find  
meritless Veta's argument that the trial court abused its discretion by not expressly  
addressing that rule. And, in view of the close relationship between Rule 8.3(a)  
and the IAD, that omission did not preclude the trial court from basing its denial  
of Veta's habeas corpus petition on the law of the case doctrine.

No other exception to that doctrine applies here. The issues, evidence and  
applicable law clearly did not change between the trial court's denial of Veta's

1 motions to dismiss and its denial of his habeas corpus petition. And, the trial  
2 court's denial of Veta's motions to dismiss and motion for reconsideration was not  
3 "manifestly erroneous or unjust." *Powell-Cerkoney*, 176 Ariz. at 279, 860 P.2d at  
4 1332.

5 Finally, although not addressed by the parties, several other grounds support the  
6 trial court's ruling. Arizona's rules require defense counsel to "advise the court  
7 of the impending expiration of time limits in the defendant's case." Ariz. R. Crim.  
8 P. 8.1(d); *see also State v. Guerrero*, 159 Ariz. 568, 570, 769 P.2d 1014, 1016  
9 (1989). "Failure to do so . . . should be considered by the court in determining  
10 whether to dismiss an action with prejudice pursuant to Rule 8.6." Ariz. R.  
11 Crim.P. 8.1(d); *see also State v. Vasko*, 193 Ariz. 142, ¶ 25, 971 P.2d 189, ¶ 25  
12 (App. 1998) ("Rule 8 requires a defendant to notify the court of an impending  
13 speedy trial deadline in order to preserve his objections to a Rule 8 violation.").

14 Veta failed to comply with the requirement of Rule 8.1(d) before he filed his  
15 motions to dismiss for violation of his speedy trial rights. That failure alone could  
16 have constituted adequate grounds for rejecting Veta's Rule 8.3(a) argument.  
17 Moreover, when the prosecutor sought to accelerate the trial date by a few days,  
18 Veta objected to that. And finally, Veta failed to establish that the alleged "speedy  
19 trial error in [the underlying] case [would prejudice] his defense in any way or  
20 deprive[] him of a fair trial." *Vasko*, 193 Ariz. 142, ¶ 31, 971 P.2d 189, ¶31. For  
21 all these reasons, we find no abuse of discretion in the trial court's denial of Veta's  
22 habeas corpus petition.

23 Amended Petition, App. I, Court of Appeals' December 5, 2003, Memorandum Decision,  
24 pp. 3-9, footnote omitted.

25 In addressing these issues as raised in the Petition for Review of the PCR, the  
26 Court of Appeals of Arizona stated:

27 To be entitled to relief based on ineffective assistance of counsel, a defendant must  
28 establish that counsel's performance was deficient in that it fell below prevailing  
professional norms and that this deficiency was prejudicial. *Strickland v.*  
*Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); *State v. Nash*, 143  
Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient  
showing on either prong of the *Strickland* test, the claim fails. *State v. Salazar*,  
146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). To avoid summary dismissal of a  
petition, a defendant must raise a colorable claim for relief, that is, one "that, if the  
allegations are true, might have changed the outcome." *State v. Runningeagle*, 176  
Ariz. 59, 63, 859 P.2d 169, 173 (1993).

As he does on review, Veta claimed below that trial counsel had been ineffective  
because he failed to assert Veta's speedy trial rights under Rule 8, Ariz. R. Crim.  
P., and the Interstate Agreement on Detainers, A.R.S. § 31-481(IAD). Rejecting  
that claim, the trial court found that Veta had failed to establish counsel's  
performance had been deficient in this regard or that Veta had been prejudiced in  
any event. Relying on *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659 (2000), on  
which Veta relied as well, the trial court found Veta was bound by counsel's  
agreement that trial could be conducted outside the 180-day period within which  
he was required to be tried under article III of the IAD. The court further found  
that, even assuming counsel had performed deficiently by agreeing Veta could be  
tried more than 180 days after he was transported to this state, Veta was not

1 prejudiced by any such delay.

2 We note at the outset that Veta has not provided us with sufficient information on  
3 review to establish that his trial was, in fact, conducted outside the time limit.  
4 Moreover, there is vast confusion about which provision of the IAD applied – the  
5 180-day time limit of article III(a) or the 120-day limit of article IV(c).<sup>1</sup> In any  
6 event, Veta has not sustained his burden on review of establishing that the trial  
court abused its discretion when it rejected this claim. We agree with the trial  
court that *Hill* defeats rather than supports Veta’s claim and that Veta did not  
meaningfully distinguish that case from his. Nor has Veta established that his  
rights under the Sixth Amendment were violated.

7 <sup>1</sup>Rule 8.3(a), Ariz. R. Crim. P., provides the following with respect to a  
8 person who is outside the state:

9 Within 90 days after receipt of a written request from any person  
10 charged with a crime and incarcerated without the state, or within a  
11 reasonable time after otherwise learning of such person’s  
12 incarceration without the state, the prosecutor shall take action as  
required by law to obtain such person’s presence for trial. Within 90  
days after the defendant had been delivered into the temporary  
custody of the appropriate authority of this state, he or she shall be  
brought to trial.

13 Article IV(c) of the IAD provides:

14 In respect of any proceeding made possible by this [a]rticle, trial  
15 shall be commenced within one hundred twenty days of the arrival  
16 of the prisoner in the receiving state, but for good cause shown in  
open court, the prisoner or his counsel being present, the court  
having jurisdiction of the matter may grant any necessary or  
reasonable continuances.

17 The records shows that in its minute entry of June 28, 2002, the trial court denied  
18 Veta’s motion to dismiss the charges based on a violation of the IAD. The court  
19 noted that Veta had been indicated in 1996; that a bench warrant had issued,  
20 resulting in his extradition from Kentucky pursuant to article IV of the IAD; and  
21 that, pursuant to article IV(c) of the IAD, his trial had to be held within 120 days  
22 of his arrival in Arizona on February 20, 2002. The trial court further noted, and  
23 the records reflects, that, at a pretrial conference on April 19, 2002, the court set  
24 the case for trial “at Defendant’s Counsel’s request and in Defendant’s presence,  
25 for July 9, 2002.” The court added, “in setting the trial date, neither the Court nor  
26 Defense Counsel nor the Deputy County Attorney was aware that the 120-day limit  
27 pursuant to [a]rticle IV, rather than the 180-day limit pursuant to [a]rticle III of the  
IAD was applicable.” The trial court relied on *Hill*, in which the Supreme Court  
stated that “scheduling matters are plainly among those for which agreement by  
counsel generally controls” and that “[r]equiring express assent from the defendant  
himself for such routine and often repetitive scheduling determinations would  
consume time to no apparent purpose.” 528 U.S. at 115, 120 S.Ct. at 664. The  
trial court also noted Veta had been present when trial was set and the fact that  
he had become “unhappy with what Counsel has done makes it no less binding  
upon him.”

28 Although counsel told the court at the pretrial conference on April 19, 2002, that  
Veta was not waiving his speedy trial rights, he and Veta then agreed the case

1 could be set for trial in July, apparently beyond the time allowed under the IAD  
2 and Rule 8.3(a). Even assuming as true Veta's assertion that counsel did this as  
3 a result of "inexperience, lack of preparation, and ineptitude," the trial court found  
4 that he was not thereby prejudiced. Veta does not challenge that finding.  
5 Moreover, even if counsel had pointed out to the court the impending deadline, at  
6 best, trial would have been set for an earlier date. Nor has Veta established how  
7 he was prejudiced by the minimal delay between the 120-day deadline and the July  
8 2002 trial date. Indeed, on June 19, 2002, when Larry Rosenthal was permitted to  
9 withdraw as counsel for Veta and Chris Kimminau was appointed as advisory  
10 counsel upon Veta's request, Veta opposed any acceleration of the trial date.  
11 Additionally, the trial court granted numerous continuances on Veta's request, and  
12 the trial was not held until April 2004, demonstrating that Veta was not ready for  
13 trial in July 2002, much less before then. When trial began, Veta did not raise this  
14 issue.

15 And if Rosenthal had pointed out the impending deadline, the trial court could  
16 have found "good cause" to set the trial beyond the deadline. *See*, § 31-481, arts.  
17 III(a), IV(c). In summary, we agree with the trial court that Veta has not  
18 established he was prejudiced, even assuming Rosenthal performed deficiently by  
19 not being aware of the IAD deadline and calling it to the attention of the trial court.  
20 *Cf. State v. Engram*, 171 Ariz. 363, 368 831 P.2d 366, 367 (App. 1991) (rejecting  
21 claim trial counsel had been ineffective in not filing motion to dismiss for violation  
22 of Rule 8 because continuances were granted on defendant's request and motion  
23 would not have been granted). *See also State v. Parker*, 116 Ariz. 3, 8, 567 P.2d  
24 319, 324 (1977) (to determine whether speedy trial rights violated, court must  
25 consider length of delay, reasons for delay, defendant's assertion of right, and  
26 prejudice).

27 Amended Petition, App. F, Court of Appeals' September 26, 2007, Memorandum  
28 Decision, pp. 2-6.<sup>2</sup> In its decision on Veta's appeal, the Court of Appeals stated:

1 In Veta's case, the only difference between his habeas corpus petition and this  
2 appeal was that his trial was significantly delayed, at least partially at Veta's  
3 request, for nearly two years beyond the date that he originally claimed violated  
4 his speedy trial rights. Because this fact supports our previous finding that Veta  
5 had waived his speedy trial rights through his conduct, it would not have changed  
6 our decision to deny relief on his petition. Accordingly, that decision is the law  
7 of the case and we see no reason to address this issue again. *See [Dancing  
8 Sunshine Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986)].

9 Amended Petition, App. A, Court of Appeals' June 30, 2008, Memorandum Decision, p.  
10 4.

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11 <sup>2</sup>The Court notes that, although the appellate court stated that neither the trial court,  
12 defense attorney, nor prosecutor were aware the trial date exceeded the deadlines, Veta  
13 asserts that it was the responsibility of Arizona to insure that his trial date was set within the  
14 deadlines once Veta invoked his speedy trial rights. Veta's assertion, however, ignores not  
15 only *Hill*, but also the requirements of Ariz.R.Crim.P. 8.1(d). Further, in his Traverse, Veta  
16 asserts that waiver was the result of fraud because the prosecutor permitted the trial to be set  
17 outside the time limits. The Court does not find this conduct constitutes fraud.

1 Construction of the IAD is governed by federal law. *Cuyler v. Adams*, 449 U.S.  
2 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). Generally, a state must comply with the  
3 IAD's requirements when the state controls the triggering of the IAD by the filing of a  
4 detainer (as in art. IV cases). *See, e.g., United States v. Mauro*, 436 U.S. 340, 343–44, 98  
5 S.Ct. 1834, 56 L.Ed.2d 329 (1978). The Supreme Court has determined that a defense  
6 attorney may effectively waive a defendant's right to be brought to trial within the time  
7 periods specified under the IAD by agreeing to a trial date outside of the time period,  
8 even without the express consent of the defendant. *Hill*.

9 Veta relies on *United States v. Mezzanatto*, 513 U.S. 196 (1995), for the general  
10 proposition that waivers must be voluntary.<sup>3</sup> In effect, Veta argues that his invocation of  
11 his speedy trial rights shows that he did not voluntarily waive his right to a speedy trial.  
12 However, even pre-*Hill*, the Ninth Circuit had determined that a defendant who had  
13 invoked the provisions of the IAD could still waive those rights by agreeing to a trial  
14 continuance. *See Brown v. Wolff*, 706 F.2d 902 (9th Cir. 1983). Indeed, the state courts  
15 all found that Veta was present when counsel suggested a trial date outside the Rule 8 and  
16 IAD time limits and Veta has not disputed this finding. In other words, Veta was present  
17 during both the invocation and the waiver . . . despite his stated desire to invoke his  
18 speedy trial rights, Veta did not demonstrate any objection to the trial date when counsel  
19 proposed the trial date.

20 . . . . .

21 . . . . .

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23  
24 <sup>3</sup>Respondents point out that *Mezzanatto* did not discuss waiver of IAD timelines. Veta  
25 asserts, however, that *Mezzanatto* sets forth the standard of review for voluntariness of an  
26 agreement to waive statutory, non-constitutional rights. The Court notes that the Supreme  
27 Court relied on *Mezzanatto* in *Hill* for the assertion that there is a general rule that presumes  
28 the availability of a waiver. However, this Court is not aware of any cases that apply  
*Mezzanatto* to an IAD waiver. Nonetheless, because the Court does not find that the record  
shows an affirmative indication such that the waiver of the deadlines was involuntary, the  
Court need not determine whether *Mezzanatto* is applicable in IAD cases.

1           Moreover, *Mezzanato* does not alter the holding in *Hill* that held that a defense  
2 attorney can effectively waive a defendant’s speedy trial rights under the IAD. Veta’s  
3 purported affirmative conduct of asserting his speedy trial rights during the same hearing  
4 in which the “untimely” trial date was proposed by the defense, when considered with the  
5 facts that the trial court could have scheduled the trial date beyond the deadlines for good  
6 cause, Veta did not advise the court of impending violations, Veta requested subsequent  
7 continuances, and Veta objected to an accelerated trial date does not establish that the  
8 waiver was involuntary.

9           Veta also relies on *People v. Sevigny*, 679 P.2d 1070 (Colo. 1984), *superseded by*  
10 *statute*, which held that a voluntary waiver in the context of IAD speedy trial rights  
11 “requires a showing of record that the defendant or his attorney freely acquiesced in a  
12 trial date beyond the speedy trial period,” and that “mere silence, by itself, does not prove  
13 a waiver.” 679 P.2d at 1075.<sup>4</sup> In this case, however, Veta and his attorney did not stand  
14 silent. Rather, Veta’s attorney, in Veta’s presence, proposed a trial date outside the Rule  
15 8 and IAD time limits. Amended Petition, App. G, p. 2. Although Veta asserts, in his  
16 Traverse, that he objected by invoking his speedy trial rights, this fails to take into  
17 account that the defense agreed to the trial date *during the same hearing*. Further, Veta  
18 does not provide any authority for his implied assertion that Colorado law controls this  
19 case.

20           The state appellate court found the trial court did not err in ruling, pursuant to *Hill*,  
21 that counsel had waived Veta’s speedy trial rights under the IAD by agreeing to a trial  
22 date beyond the IAD’s time limit. *See State v. Nelson*, 755 P.2d 1175, 1177 (Ariz. App.  
23 1988); *State v. Carter*, 729 P.2d 336, 338 (Ariz. App. 1986) (IAD time limitations are for  
24 the benefit of the defendant and can be waived). The appellate court also determined that

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25  
26           <sup>4</sup>The Court notes that the holding in *Sevigny* has since been superseded by statute in  
27 Colorado. *See People v. Newton*, 764 P.2d 1182, 1187 (Colo. 1988) (holding that under an  
28 amendment to the relevant state statute, the silence of the defendant or defense counsel in the  
setting of an extended trial date waives the speedy trial period under the IAD).

1 counsel could and did waive Veta's speedy trial rights under Rule 8.3(a).

2 Article IV(c) of the IAD specifically provides that "the court having jurisdiction  
3 of the matter may grant any necessary or reasonable continuance." The "'necessary or  
4 reasonable continuance' provision is, by clear implication, the sole means by which the  
5 prosecution can obtain an extension of the time limits over the defendant's objection."  
6 *Hill*, 528 U.S. at 116. Moreover, not only does art. III(a) of the IAD permits "good-cause  
7 continuances" when either the "prisoner or his counsel" is present, but the Supreme Court  
8 held that IAD scheduling decisions may be decided by counsel. *Hill*, 528 U.S. at 115.  
9 In this case, the trial court determined that counsel had agreed to a trial date beyond the  
10 IAD time limit and that this agreement took place in open court in Veta's presence. The  
11 appellate court adopted this determination.<sup>5</sup> Veta's argument that he is not bound by  
12 counsel's agreement to a trial date outside the IAD time limit is contrary to *Hill* in which  
13 the Court stated that scheduling matters are among those trial decisions in which a  
14 personal waiver by the defendant is not necessary. 528 U.S. at 115. The state courts'  
15 determination that Veta's speedy trial rights were waived is consistent with the federal  
16 authority.

17 Moreover, as the appellate court pointed out, the trial court could have scheduled  
18 the trial date beyond the deadlines for good cause, Veta requested subsequent  
19 continuances, and Veta objected to an accelerated trial date. Although Veta disputes the  
20 relevance of these finding (e.g., court did not timely consider good cause and subsequent  
21 continuances were after expiration of time limit), the Court finds that these were relevant  
22 considerations of the state court. *See Reed*, 512 U.S. at 342 (absent allegations of  
23 prejudice, IAD violation claims are not cognizable under federal habeas review).

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24  
25 <sup>5</sup>The "necessary and reasonable continuance" provision in art. IV(c) "is directed  
26 primarily, if not indeed exclusively, to prosecution requests that have not explicitly been  
27 agreed to by the defense." *Hill*, 528 U.S. at 115. Because the prosecution was not seeking  
28 a continuance over Veta's objection, art. IV(c)'s "necessary and reasonable continuance"  
provision is not applicable. *Id.*



1 Additionally, the appellate court determined that Veta did not advise the court of  
2 impending violations. Because Veta did not show prejudice, the appellate court denied  
3 Veta’s claim that counsel was ineffective.<sup>6</sup>

4 This Court does not find that the state court rulings were objectively unreasonable.  
5 28 U.S.C. § 2254(d); *Bell v. Cone*, 535 U.S. 685, 698-99, 122 S.Ct. 1843, 1852, 152  
6 L.Ed.2d 914 (2002) (habeas court is not to make its own independent judgment, but is to  
7 determine whether state court applied federal authority in an objectively unreasonable  
8 manner). The Court finds that Veta has failed to show that he is entitled to habeas relief  
9 on these claims.

10  
11 *Jury Instruction – Hiding*

12 Veta asserts that the trial court erred by giving a jury instruction on the definition  
13 of “hiding” because it was unsupported by the evidence. As to this issue, the Court of  
14 Appeals of Arizona stated:

15 Veta contends the trial court erred by instructing the jury that it was permitted to  
16 consider any evidence of his “hiding” in reaching a verdict. The state responds  
17 that sufficient evidence was introduced at trial to support the instruction and it was  
18 properly given.

18 We review a trial court’s decision to give a particular instruction for an abuse of  
19 discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003).  
20 A trial court may properly give an instruction on any theory that is reasonably  
21 supported by the evidence. *See State v. Cruz*, 189 Ariz. 29, 31, 938 P.2d 78, 80  
(App. 1996). On appeal, we view the evidence in the light most favorable to  
22 sustaining the decisions below. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d  
23 252, 253 (App. 2007). The core of Veta’s argument is that there was no evidence

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22 <sup>6</sup>Veta asserts that his ineffective assistance of counsel claim is based on counsel’s  
23 ignorance of the speedy trial limits and proposing an untimely trial date. Veta asserts that  
24 counsel’s proposed untimely trial date after invoking Veta’s speedy trial rights shows that  
25 counsel’s conduct was neither strategic nor tactical. However, Veta’s argument fails to  
26 acknowledge that the trial court could have scheduled the trial date beyond the deadlines for  
27 good cause, Veta did not advise the court of impending violations, Veta requested subsequent  
28 continuances, and Veta objected to an accelerated trial date. In effect, Veta asserts that,  
because counsel proposed the trial date, Veta lost the right to complain of the delay during  
the motion to dismiss hearing. However, this argument fails to acknowledge that other  
factors could appropriately be considered (e.g., good cause, notice of impending deadline).

1 presented at trial to support the giving of this instruction.<sup>2</sup>

2 <sup>2</sup>In his brief, Veta suggests that, because the facts at trial were not identical  
3 to hypothetical evidence the court outlined in ruling on the issue at trial, the  
4 evidence was not sufficient. However, as discussed below, this is not the  
5 standard of review.

6 The trial court instructed the jury as follow:

7 In determining whether the state has proved the defendant guilty beyond a  
8 reasonable doubt, you may consider any evidence of the defendant's hiding,  
9 together with all the other evidence in the case. You may also consider the  
10 defendant's reasons for hiding. Hiding after a crime has been committed  
11 does not by itself prove guilt.

12 If the evidence suggests "the accused attempted to conceal himself," then this type  
13 of instruction is proper. *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199  
14 (1983). Such an attempt at concealment by the accused "can certainly be read as  
15 revealing a consciousness of guilt," and that is the basis for the instruction. *State*  
16 *v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992); *see also State v. Noleen*,  
17 142 Ariz. 101, 108, 688 P.2d 993, 1000 (1984) (instruction proper when evidence  
18 "support[s] the inference that the accused utilized the element of concealment or  
19 attempted concealment"), *quoting State v. Smith*, 113 Ariz. 298, 300, 552 P.2d  
20 1192, 1194 (1976); *State v. Loyd*, 126 Ariz. 364, 367, 616 P.2d 39, 42 (1980) (fact  
21 appellant fled state and used different name sufficient to justify flight instruction);  
22 *State v. Speers*, 209 Ariz. 125, ¶ 31, 98 P.3d 560, 568 (App. 2004) (evidence must  
23 demonstrate defendants' actions made "him harder to find or camouflage[d] his  
24 activities" to justify flight instruction).

25 At trial, Terese, the mother of Veta's victims, testified that her eldest son, who was  
26 not a victim, had informed Veta about the accusations. After that, Veta called  
27 Terese several times, asking each time is she was recording his calls.<sup>3</sup> Although  
28 Veta initiated the contact with Terese and stated he wanted to see his children, he  
refused to tell her where he was. Terese also testified she had not seen Veta again  
and he had abandoned "everything" in his trailer, including his clothes, items  
borrowed from friends, his birth certificate, and personal photographs, after he  
found out about the accusations. The only item Terese could identify that Veta had  
apparently taken with him was "a special pillow for his neck."

<sup>3</sup>Eventually, Veta made incriminating admissions during a call Terese  
recorded, an action she testified was prompted by his obvious concern about  
whether or not he was being recorded.

Retired Tucson Police Detective Carrillo, who investigated the case in 1996, had  
unsuccessfully attempted to locate Veta at the trailer, at the radio station where he  
worked, and at his parents' home in Phoenix. Carrillo was never able to find Veta  
during his investigation. Gula "Myke" Palmer, Veta's childhood skating coach,  
testified she too had attempted to contact Veta during this time, but "couldn't find  
him" and had contacted his parents for assistance. Based on this evidence, the jury  
reasonably could infer that Veta had absented himself in order to avoid facing the  
accusations against him. Because the evidence supported the "hiding" instruction,  
the court did not abuse its discretion in giving it. [Footnote omitted.]

Amended Petition, App. A, Court of Appeals' June 30, 2008, Memorandum Decision, pp.

1 4-7.

2 Because the correctness of a jury instruction under state law is not a federal  
3 question, the only issue for this Court to determine is whether there is a reasonable  
4 likelihood that the jury instruction violated Veta's right to due process. *Estelle v.*  
5 *McGuire*, 502 U.S. 62, 71-72 (1991); *see also Prantil v. State of California*, 843 F.2d  
6 314, 317 (9th Cir. 1988) (improper jury instruction is basis for habeas relief only if  
7 instruction "so infected the entire trial that the resulting conviction violates due process").

8 In Arizona, in determining whether a hiding or flight instruction is appropriate,  
9 the evidence is viewed to ascertain whether it supports a reasonable inference that  
10 the flight or attempted flight was open, such as the result of an immediate pursuit.  
11 If this is not the case then the evidence must support the inference that the accused  
12 utilized the element of concealment or attempted concealment. The absence of any  
13 evidence supporting either of these findings would mean that the giving of an  
14 instruction on flight would be prejudicial error.

15 *State v. Smith*, 552 P.2d 1192, 1194 (Ariz. 1976), *citation omitted*. A court must "be able  
16 to reasonably infer from the evidence that the defendant left the scene in a manner which  
17 obviously invites suspicion or announces guilt." *State v. Weible*, 688 P.2d 1005, 1008  
18 (Ariz. 1984). The Arizona appellate court discussed the evidence from which a jury  
19 reasonably could infer that Veta had absented himself in order to avoid facing the  
20 accusations against him. In seeking habeas relief, Veta presents and argues conflicting  
21 facts and inferences. This does not address whether there was sufficient evidence to  
22 warrant the jury instruction; rather such disputes were for the jury to resolve and  
23 determine which facts and inferences, if any, to accept. This Court agrees with the state  
24 courts that the evidence supported the giving of the "hiding" instruction. The Court finds  
25 Veta has not shown that he was denied due process because of the instruction and,  
26 therefore, Veta is not entitled to habeas relief on this claim.

### 27 *Sentencing Enhancement*

28 Veta asserts that his sentence was enhanced in violation of his Sixth and  
Fourteenth Amendment rights. Specifically, Veta asserts that he did not receive notice

1 of any dangerous crimes against children (“DCAC”) enhancement in the amended  
2 indictment. The Court of Appeals stated:

3 Veta lastly complains he was improperly sentenced under A.R.S. § 13-604.01, the  
4 dangerous crimes against children statute, because he “received no notice of any  
5 . . . enhancement[] as to the amended indictment.” As noted above, Veta was  
6 originally indicted on thirteen counts involving two victims, with an allegation that  
7 twelve of those offenses were dangerous crimes against children. Prior to trial, the  
8 state moved to amend Veta’s indictment to accommodate changes in its  
9 interpretation of A.R.S. § 13-1417, the continuous sexual abuse of a child statute,  
10 during the eight years since he had been indicted. This amendment sought to  
11 combine the three separate counts of Continuous Sexual Abuse into a single count.  
12 The state also sought to dismiss two additional counts of sexual conduct with a  
13 minor and one count of molestation based on specific, identifiable occurrences  
14 during the same time period, to reflect the state’s determination that the statute was  
15 intended “to include all counts of molestation and sexual conduct in one count of  
16 continuous sexual abuse” within a specific period of time. *See* A.R.S. § 13-  
17 1417(D); *see also State v. Ramsey*, 211 Ariz. 529, ¶ 8, 124 P.3d 756, 760 (App.  
18 2005) (“subsection (D) . . . addresses what charges may be brought in a current  
19 proceeding involving a charge under § 13-1417”). The trial court granted the  
20 state’s motion, finding “[t]he amendment of the Indictment does not operate to  
21 change the nature of the offense charged or to prejudice the Defendant.” The court  
22 also noted the amendment reduced Veta’s “criminal exposure” and that “[n]o new  
23 charges are being added and the Defendant specifically was on notice of all  
24 charges set forth in the original Indictment.”

25 In Veta’s original indictment, the state had included a separate allegation of  
26 dangerous crimes against children for counts one through twelve. After the  
27 amendment, counts one through six of the original indictment had been replaced  
28 by an amended count one.<sup>5</sup> The remaining counts were unchanged. Thus, Veta’s  
argument that he lacked notice of the dangerous crimes allegation could only apply  
to the amended count. However, the state’s allegation clearly stated “the offenses  
of continuous sexual abuse of a child, as charged in Counts One, Two and Four,  
. . . are offenses involving a dangerous crime against children.” The amendment  
simply merged those three original counts of continuous sexual abuse of a child  
into an amended count one. It is therefore clear Veta received notice that he was  
being charged with continuous sexual abuse of a child as a dangerous crime  
against children, whether it was one count or three.

<sup>5</sup>It appears that no written supervening indictment was filed, although the  
amended charges were read to the jury at the beginning of trial.

Moreover, although he was aware of it, Veta did not object to this dangerous  
crimes enhancement at trial or at sentencing. During a discussion of potential  
lesser-included offenses, Veta’s counsel determined there would have been no  
benefit to giving particular lesser-included instructions because those offenses  
were “still [dangerous crimes against children]” and Veta would receive no  
sentencing benefit if convicted of them. This undercuts Veta’s argument that he  
lacked notice of the dangerous crimes against children allegation.

Finally, on each verdict form in which the jury had found Veta guilty, the jury  
answered a special interrogatory about the age of the victim. As to the involving  
minors in drug offenses count, the jury found the victim had been under the age of  
fifteen. Section 13-3409(B), A.R.S., defines that crime and specifically provides

1 that when the minor involved is under fifteen, the offense is punishable under § 13-  
2 604.01 as a dangerous crime against children. The jury also specifically found the  
3 victim of each count of sexual conduct with a minor was under the age of fifteen.  
4 section 13-1405, A.R.S., defines sexual conduct with a minor and states that when  
5 the victim is less than fifteen years old, the offense is punishable pursuant to § 13-  
6 604.01. The jury additionally found that the victim of the continuous sexual abuse  
7 of a child count was under the age of fourteen. However, A.R.S. § 13-1417(B)  
8 makes that offense punishable pursuant to § 13-604.01 regardless of the victim's  
9 age. Thus, even if Veta's claim that he lacked notice under the amended  
10 indictment had any merit, he nevertheless had notice that § 13-604.01 would apply  
11 to him because the statute defining the offenses he was charged with provide for  
12 sentencing under that statute. *See Raney v. Lindberg*, 206 Ariz. 193, ¶ 6, 76 P.3d  
13 867, 870 (App. 2003) ("A charging document provides a defendant with the  
14 requisite notice [of the range of potential sentence] by citing the applicable statutes  
15 pertaining to the charged crime(s) in compliance with Arizona Rules of Criminal  
16 Procedure 13.2(b).").

17 Amended Petition, App. A, Court of Appeals' June 30, 2008, Memorandum Decision, pp.  
18 7-10.

19 Sentencing errors that are presented to a state court on direct appeal which claim  
20 a violation of state law do not present federal constitutional claims. *See Hendricks v.*  
21 *Zenon*, 993 F.2d 664, 674 (9th Cir. 1993) (a state court's refusal to reverse a sentence on  
22 state law grounds is not reviewable in federal habeas). Indeed, the Ninth Circuit has  
23 refused to consider state law errors in the application of state sentencing law. *Souch v.*  
24 *Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002). Moreover, a due process violation based on  
25 a misapplication of state law results only if the sentence is arbitrary and capricious.  
26 *Richmond v. Lewis*, 506 U.S. 40, 50 (1992). Here, the appellate court found that Veta had  
27 notice of the DCAC enhancements, *see State v. Jobe*, 157 Ariz. 328, 757 P.2d 604 (App.  
28 1988) (actual notice prior to trial of sentence enhancing allegation ensures a defendant  
will not be misled, deceived or surprised), Veta's counsel was aware of the DCAC  
allegations when arguing about the lesser included instructions, Veta did not object to the  
DCAC enhancement at trial or sentencing, and the statute under which Veta was charged  
specifically provided for sentencing pursuant to A.R.S. § 13-604.01 (the DCAC statute).

This Court does not find that the state court rulings were objectively unreasonable.  
28 U.S.C. § 2254(d); *Bell v. Cone*, 535 U.S. at 698-99 (habeas court is not to make its  
own independent judgment, but is to determine whether state court applied federal

1 authority in an objectively unreasonable manner). The original indictment provided  
2 notice of the DCAC enhancement, the Amended Indictment merely combined three  
3 separate counts into one count, and Veta did not object to the enhancement at trial or at  
4 sentencing. Moreover counsel demonstrated his notice of the enhancement during  
5 discussion of potential lesser-included offenses. Lastly, Veta had notice that § 13-604.01  
6 would apply to him because the statute defining the offenses he was charged with  
7 provides for sentencing under that statute. The Court finds that Veta failed to show that  
8 he is entitled to habeas relief on this claim.

9  
10 *Certificate of Appealability (“COA”)*

11 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the  
12 “district court must issue or deny a certificate of appealability when it enters a final order  
13 adverse to the applicant.” Such certificates are required in cases concerning detention  
14 arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C. §  
15 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here,  
16 the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant  
17 to a State court judgment. This Court must determine, therefore, if a COA shall issue.

18 The standard for issuing a COA is whether the applicant has “made a substantial  
19 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district  
20 court has rejected the constitutional claims on the merits, the showing required to satisfy  
21 § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists  
22 would find the district court's assessment of the constitutional claims debatable or  
23 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).  
24 “When the district court denies a habeas petition on procedural grounds without reaching  
25 the prisoner's underlying constitutional claim, a COA should issue when the prisoner  
26 shows, at least, that jurists of reason would find it debatable whether the petition states  
27 a valid claim of the denial of a constitutional right and that jurists of reason would find  
28 it debatable whether the district court was correct in its procedural ruling.” *Id.* In the

1 certificate, the Court must indicate which specific issues satisfy the showing. *See* 28  
2 U.S.C. § 2253(c)(3).

3         The Ninth Circuit has not addressed the effect of *Reed* on *Carlson* and *Cody*. The  
4 Court finds that reasonable jurists could find this Court’s determination that Veta’s IAD  
5 claim is not cognizable in a habeas petition is debatable or wrong. Moreover, the Court  
6 finds that reasonable jurists could find this Court’s determination that Veta’s claims that  
7 (1) invocation of his speedy trial rights did not make his IAD waiver involuntary and (2)  
8 Veta had not shown that he was prejudiced by the alleged deficiency of counsel are  
9 debatable or wrong. The Court finds, therefore, that a COA shall issue as to these claims.

10         As to Veta’s claims that his rights were violated when (1) the trial court gave a  
11 “hiding” instruction unsupported by the evidence and denied Veta a new trial and (2) he  
12 was sentenced under A.R.S. § 13-604.01 after receiving no notice of “DCAC”  
13 enhancement prior to trial in his Amended Indictment, the Court finds that reasonable  
14 jurists would not find this Court’s assessment of the constitutional claims debatable or  
15 wrong. A COA shall not issue as to these claims.

16         Any further request for a COA must be addressed to the Court of Appeals. *See*  
17 Fed. R.App. P. 22(b); Ninth Circuit R. 22-1.

18  
19         Accordingly, IT IS ORDERED:

20         1. Veta’s Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas  
21 Corpus by a Person in State Custody is DENIED;

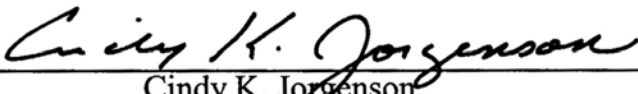
22         2. This matter is DISMISSED with prejudice;

23         3. The Clerk of the Court shall enter judgment and shall then close its file in  
24 this matter, and;

25         4. A Certificate of Appealability shall issue as to Claim 1 (Veta’s Fourteenth  
26 Amendment Due Process liberty interest right was violated when Arizona failed to release  
27 him after time limits of Ariz.R.Crim.P. 8.3(a) and the IAD were exceeded) and Claim 2  
28 (Veta’s Sixth and Fourteenth Amendment rights to effective assistance of counsel was

1 violated when Rosenthal, despite his agreement with Veta not to waive any of his speedy  
2 trial rights and invoking those rights, proposed a time frame outside Veta's time limits,  
3 effectively waiving Veta's speedy trial rights).

4 DATED this 1st day of March, 2010.

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8 Cindy K. Jorgenson  
9 United States District Judge  
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