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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Michael Hollenback,
Petitioner,
vs.
Charles Ryan, et al.,
Respondents.

No. CV 10-333-TUC-FRZ

ORDER

On June 3, 2010, Petitioner, Robert Michael Hollenback, an inmate confined in the Arizona State Prison Complex-Florence in Florence, Arizona, filed a *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to Title 28, U.S.C. § 2254, with exhibits A through E attached. (“Petition”). (Doc. 1.) Respondents have filed an answer to the Petition (“Answer”) with exhibits A through H attached. (Doc. 8.) Petitioner filed a reply (“Reply”) on April 19, 2011. (Doc. 9). For the reasons discussed below, the Court (1) dismisses grounds one and two of the Petition as procedurally defaulted, alternatively, denies relief for grounds one and two on the merits; (2) denies relief for ground three on the merits; and (3) grants relief on ground four of the Petition.

I. BACKGROUND

A. Trial Court Proceedings

On March 28, 2003, Petitioner was indicted by the grand jurors of Pima County in Arizona Superior Court, on charges of one count each of molestation of a child, sexual conduct with a minor under fifteen years of age, and luring a minor for sexual

1 exploitation. (Doc. 8, Ex. A, Indictment.). The State separately filed an allegation that all
2 three counts as charged were offenses involving dangerous crimes against children,
3 pursuant to A.R.S. § 13-604.01. (*Id.*, Allegations.) The State also filed allegations of a
4 predicate offense and prior conviction of attempted sexual conduct with a minor under
5 fourteen. (*Id.*)

6
7 A jury convicted Petitioner on all three counts, and, on March 29, 2004, the trial
8 court sentenced Petitioner to the presumptive terms of imprisonment on all counts: 28
9 years for count one; life imprisonment for count two; and 10 years for count three. (*Id.*,
10 Minute Entry 3/29/04.) The trial court ordered that all counts be served consecutively.
11
12 (*Id.*)

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14 B. Appeal

15 Petitioner filed a direct appeal of his conviction and sentence raising five grounds
16 for relief: (1) A.R.S. § 13-3554 is inapplicable to conduct that does not involve producing
17 pornographic material; (2) the trial court erred in enhancing Petitioner's sentence using
18 the State's late-requested interrogatory that asked the jury to determine whether the
19 victims were under 12 years old; (3) fundamental error occurred when the trial court
20 sentenced Petitioner in count two under A.R.S. § 13-604.01 and not A.R.S. § 13-702.02;
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22 (4) fundamental error occurred when the trial court sentenced Petitioner to life when that
23 was not required under A.R.S. § 13-604.01(B); and (5) fundamental error occurred when
24 14 jurors deliberated. (Doc. 8, Ex. B.) The appellate court affirmed the convictions and
25 sentences in an opinion filed on December 29, 2005. (Doc. 1, Ex. A). Petitioner's petition
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1 for review to the Arizona Supreme Court was denied without comment on September 26,
2 2006. (*Id.*, Ex. B).

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4 C. Petition for Post-Conviction Relief

5 Petitioner's notice of post-conviction relief was filed on November 2, 2006. (Doc.
6 8, Ex. D.) Petitioner, through counsel, filed a Petition for Post-Conviction Relief ("PCR")
7 on June 21, 2007. (*Id.*) Petitioner argued that trial counsel was ineffective for (1) failing
8 to properly object to hearsay testimony; (2) failing to object to other act evidence; (3)
9 failing to request a lesser included jury instruction of attempted molestation of a child;
10 and (4) failing to call an expert witness on the effect of improperly conducted forensic
11 interviews with children. (*Id.*)
12

13
14 The trial court denied relief without an evidentiary hearing and dismissed the
15 notice on December 20, 2007. (Doc. 1, Ex. C.) In his petition for review of the trial
16 court's decision to the court of appeals, Petitioner argued that trial counsel was
17 ineffective for (1) failing to object to the State's improper use of hearsay as substantive
18 evidence; and (2) failing to request a lesser included jury instruction of attempted
19 molestation of a child. (Doc. 8, Ex. E.)
20

21
22 On September 5, 2008, in a memorandum decision, the Arizona Court of Appeals
23 granted review, and denied relief. (Doc. 1, Ex. D.) Petitioner's petition for review to the
24 Arizona Supreme Court was denied without comment on June 1, 2009. (*Id.*, Ex. E.)
25

26 D. Federal Habeas Petition

27 Petitioner's habeas corpus petition, placed in the prison mailing system on May
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1 19, 2010 (*Id.* at 11), raises four grounds in support of his request for habeas relief. In
2 Ground One, Petitioner contends that his Fifth and Fourteenth Amendment due process
3 rights were violated because he was convicted of “luring a minor for sexual exploitation,”
4 but the conduct in which he engaged—“the mere solicitation for oral sex”—is not
5 conduct that violates Arizona Revised Statutes § 13-3554(A). In Ground Two, Petitioner
6 asserts that his due process rights were violated because he was sentenced with an “under
7 12” enhancement “without proper notice of such enhancement.” In Grounds Three and
8 Four, Petitioner claims he received ineffective assistance of counsel (“IAC”), in violation
9 of the Sixth and Fourteenth Amendments.
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12 **II. DISCUSSION**

13 **A. Standard of Review**

14 Because Petitioner filed his petition after April 24, 1996, this case is governed by
15 the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)
16 (“AEDPA”).
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19 **B. Statute of Limitations**

20 Under the AEDPA, a state prisoner must generally file a petition for writ of habeas
21 corpus within one year from “the date on which the judgment became final by the
22 conclusion of direct review or the expiration of time for seeking such review [.]” 28
23 U.S.C. § 2244(d)(1)(A). The running of this one-year statute of limitations on habeas
24 petitions for state convictions is tolled during any period when “a properly filed
25 application for state post-conviction or other collateral review with respect to the
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1 pertinent judgment or claim is pending" in any state court. *See* 28 U.S.C. § 2244(d)(2).
2 Thus, the statute of limitations is tolled during the pendency of a state court action for
3 post-conviction relief. 28 U.S.C. § 2244(d)(2).
4

5 C. Exhaustion of State Remedies

6 A writ of habeas corpus may not be granted unless it appears that a petitioner has
7 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
8 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must “fairly
9 present” the operative facts and the federal legal theory of his claims to the state's highest
10 court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848
11 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277–
12 78 (1971). If a habeas claim includes new factual allegations not presented to the state
13 court, it may be considered unexhausted if the new facts “fundamentally alter” the legal
14 claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260
15 (1986).
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19 In Arizona, there are two primary procedurally appropriate avenues for petitioners
20 to exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of
21 the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a
22 petitioner is precluded from relief on any claim that could have been raised on appeal or
23 in a prior PCR petition. Ariz.R.Crim.P. 32.2(a)(3). The preclusive effect of Rule 32.2(a)
24 may be avoided only if a claim falls within certain exceptions (subsections (d) through
25 (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior
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1 petition or not presented in a timely manner. *See* Ariz.R.Crim.P. 32.1(d)-(h), 32.2(b),
2 32.4(a).

3
4 A habeas petitioner's claims may be precluded from federal review in two ways.
5 First, a claim may be procedurally defaulted in federal court if it was actually raised in
6 state court but found by that court to be defaulted on state procedural grounds. *Coleman*,
7 501 U.S. at 729–30. Second, a claim may be procedurally defaulted if the petitioner failed
8 to present it in state court and “the court to which the petitioner would be required to
9 present his claims in order to meet the exhaustion requirement would now find the claims
10 procedurally barred.” *Coleman*, 501 U.S. at 735 n. 1; *see also Ortiz v. Stewart*, 149 F.3d
11 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim
12 could be pursued by any presently available state remedy). If no remedies are currently
13 available pursuant to Rule 32, the claim is “technically” exhausted but procedurally
14 defaulted. *Coleman*, 501 U.S. at 732, 735 n. 1; *see also Gray v. Netherland*, 518 U.S.
15 152, 161-62 (1996).

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19 Because the doctrine of procedural default is based on comity, not jurisdiction,
20 federal courts retain the power to consider the merits of procedurally defaulted claims.
21 *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a
22 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the
23 failure to properly exhaust the claim in state court and prejudice from the alleged
24 constitutional violation, or shows that a fundamental miscarriage of justice would result if
25 the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.
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1 Cause is defined as a "legitimate excuse for the default," and prejudice is defined
2 as "actual harm resulting from the alleged constitutional violation." *Thomas v. Lewis*, 945
3 F.2d 1119, 1123 (9th Cir. 1991); *see Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a
4 showing of cause requires a petitioner to show that "some objective factor external to the
5 defense impeded counsel's efforts to comply with the State's procedural rule"). Prejudice
6 need not be addressed if a petitioner fails to show cause. *Thomas*, 945 F.2d at 1123 n.10.
7 To bring himself within the narrow class of cases that implicate a fundamental
8 miscarriage of justice, a petitioner "must come forward with sufficient proof of his actual
9 innocence" *Sistrunk v. Armenakis*, 292 F.3d 669, 672-73 (9th Cir. 2002) (internal
10 quotation marks and citations omitted), which can be shown when "a petitioner 'presents
11 evidence of innocence so strong that a court cannot have confidence in the outcome of
12 the trial unless the court is also satisfied that the trial was free of nonharmless
13 constitutional error.'" *Id.* at 673 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

14 D. Standard of Review: Merits

15 Petitioner's habeas claims are governed by the applicable provisions of the
16 Antiterrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy*, 521 U.S.
17 320, 336 (1997). The AEDPA established a "substantially higher threshold for habeas
18 relief" with the "acknowledged purpose of 'reduc[ing] delays in the execution of state
19 and federal criminal sentences.'" *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007)
20 (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "highly
21 deferential standard for evaluating state-court rulings' ... demands that state-court
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1 decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24
2 (2002) (*per curiam*) (quoting *Lindh*, 521 U.S. at 333 n. 7).

3
4 Under the AEDPA, a petitioner is not entitled to habeas relief on any claim
5 “adjudicated on the merits” by the state court unless that adjudication:

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

9 (2) resulted in a decision that was based on an unreasonable determination
10 of the facts in light of the evidence presented in the State court
11 proceeding.

12 28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision
13 regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v.*
14 *Nunnemaker*, 501 U.S. 797, 803–04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664
15 (9th Cir. 2005).

16
17 “The threshold question under AEDPA [is] whether [the petitioner] seeks to apply
18 a rule of law that was clearly established at the time his state-court conviction became
19 final.” *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under
20 subsection (d)(1), the Court must first identify the “clearly established Federal law,” if
21 any, that governs the sufficiency of the claims on habeas review. “Clearly established”
22 federal law consists of the holdings of the Supreme Court at the time the petitioner's state
23 court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549
24 U.S. 70, 74 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003), *overruled on*
25 *other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003). Habeas relief cannot be
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1 granted if the Supreme Court has not “broken sufficient legal ground” on a constitutional
2 principle advanced by a petitioner, even if lower federal courts have decided the issue.
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4 *Williams*, 529 U.S. at 381; *see Musladin*, 549 U.S. at 76-77; *Casey v. Moore*, 386 F.3d
5 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding,
6 circuit court precedent may be “persuasive” in determining what law is clearly
7 established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at
8 1069.

10 The Supreme Court has provided guidance in applying each prong of §
11 2254(d)(1). The Court has explained that a state court decision is “contrary to” the
12 Supreme Court's clearly established precedents if the decision applies a rule that
13 contradicts the governing law set forth in those precedents, thereby reaching a conclusion
14 opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set
15 of facts that is materially indistinguishable from a decision of the Supreme Court but
16 reaches a different result. *Williams*, 529 U.S. at 405–06; *see Early v. Packer*, 537 U.S. 3,
17 8 (2002) (per curiam). In characterizing the claims subject to analysis under the “contrary
18 to” prong, the Court has observed that “a run-of-the-mill state-court decision applying the
19 correct legal rule to the facts of the prisoner's case would not fit comfortably within §
20 2254(d)(1)'s ‘contrary to’ clause.” *Williams*, 529 U.S. at 406; *see Lambert v. Blodgett*,
21 393 F.3d 943, 974 (9th Cir. 2004).

22 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas
23 court may grant relief where a state court “identifies the correct governing legal rule from
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1 [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ...
2 case” or “unreasonably extends a legal principle from [Supreme Court] precedent to a
3 new context where it should not apply or unreasonably refuses to extend that principle to
4 a new context where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to
5 find a state court's application of Supreme Court precedent “unreasonable,” the petitioner
6 must show that the state court decision was not merely incorrect or erroneous, but
7 “objectively unreasonable.” *Id.* at 409; *Landrigan*, 550 U.S. at 473; *Visciotti*, 537 U.S. at
8 25.

11 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the
12 state court decision was based upon an unreasonable determination of the facts. *Miller–El*
13 *v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller–El II*). A state court decision “based on a
14 factual determination will not be overturned on factual grounds unless objectively
15 unreasonable in light of the evidence presented in the state-court proceeding.” *Miller–El*,
16 537 U.S. 322, 340 (2003) (*Miller–El I*); see *Taylor v. Maddox*, 366 F.3d 992, 999 (9th
17 Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual
18 determinations are presumed to be correct, and a petitioner bears the “burden of rebutting
19 this presumption by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*,
20 550 U.S. at 473–74; *Miller–El II*, 545 U.S. at 240.

24 **III. ANALYSIS**

25 **A. Timeliness**

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27 Petitioner had until one year after his conviction and sentence became final to file
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1 his federal petition. Relying on the Ninth Circuit’s adherence to the “prison mailbox rule”
2 Respondents concede (Doc. 8 at 5) and the Court finds that, pursuant to the AEDPA, the
3 Petition, placed in the prison mailing system on May 19, 2010, (Doc. 1 at 11) and filed in
4 this Court on June 3, 2010, is timely. *See Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir.
5 2001)(citing *Houston v. Lack*, 487 U.S. 266 (1988)(a prisoner’s federal habeas petition is
6 deemed filed when he hands it over to prison authorities for mailing to the district court)).
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9 **B. Ground One**

10 Petitioner asserts in Ground One of the Petition that his Fifth and Fourteenth
11 Amendment due process rights were violated because he was convicted of “luring a
12 minor for sexual exploitation,” but the conduct in which he engaged—“the mere
13 solicitation for oral sex”—is not conduct that violates Arizona Revised Statutes § 13-
14 3554(A). (Doc. 1 at 6). Respondents argue that Petitioner failed to fairly present Ground
15 One as a constitutional claim to the state courts on direct appeal, and thus this claim is not
16 exhausted. (Doc. 8 at 8-9). Respondents further contend that Ground One is procedurally
17 defaulted because any attempt to return to state court to present that claim would be futile
18 because it would be procedurally barred pursuant to Arizona law. (*Id.* at 10-11.)
19 Respondents also contend that Petitioner’s argument is not cognizable on habeas corpus
20 review. (*Id.* at 15.)
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24 **1. *Procedural Default***

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26 Petitioner contends that he was convicted in Count 3 of the Indictment pursuant to
27 a statute, A.R.S. § 13-3554, which did not apply to Petitioner’s alleged conduct, in
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1 violation of his Fifth and Fourteenth Amendment due process rights. (Doc. 1 at 6.)
2 Petitioner argues that the appellate courts' interpretation of A.R.S. § 13-3554 is
3 untenable; Petitioner asserts that, in order to convict under A.R.S. § 13-3554, the State is
4 required to present evidence that Petitioner "intended to or did photograph, film, or
5 otherwise create any visual item depicting the minor engaging in sexual conduct"
6 contrary to the appellate court's interpretation. (*Id.*)
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8
9 Respondents assert that Petitioner's federal claims are procedurally defaulted and
10 barred from habeas corpus review. Petitioner argued in the first claim of his direct appeal
11 that the trial court erroneously denied his motion for judgment of acquittal. Petitioner
12 argued the court erred for two reasons. First, because the offense of luring a minor for
13 sexual exploitation requires some sort of intent to photograph or otherwise record a
14 minor's image. Second, as an alternative ground for relief, Petitioner argued that the
15 motion was denied because there was insufficient evidence to establish guilt in Count 3,
16 in violation of his right to due process and a fair trial: "Alternatively, insufficient
17 evidence existed to support [Count 3] because the [S]tate failed to prove that Hollenback
18 intended to photograph, or otherwise visually depict sexual conduct. Thus, the State's
19 evidence was wholly insufficient to establish guilt in Count 3, which also violated
20 Petitioner's right to due process and a fair trial. U.S. Const., Amends. 5, 6, and 14; Ariz.
21 Const., art. 2, §§4 and 24." (Doc. 8, Ex. B at 8-9). The appellate court found that one of
22 Petitioner's victims, Z., who was eight at the time of the offenses, testified that
23 Hollenback had asked him repeatedly on multiple occasions to participate in oral sex, and
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1 thus, substantial evidence supported this charge. (Doc.1, Ex. A at ¶ 8.) The Court
2 reviewed the sufficiency of the evidence argument under an abuse of discretion standard,
3 citing *State v. Carlos*, 199 Ariz. 273 (App. 2001)(court reviews a trial court’s denial of a
4 Rule 20 motion for an abuse of discretion and will reverse a conviction only if there is a
5 complete absence of substantial evidence to support the charges). (*Id.*) Although
6 Petitioner mentioned, in passing, “due process” and a “fair trial,” the abuse of discretion
7 standard was in fact the appropriate standard of review set forth by Petitioner for
8 reviewing his alternative claim. (Doc. 8., Ex. B at 5.)
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10
11 Petitioner's passing reference to “his federal rights,” was not sufficient to fairly
12 present a federal claim to the State courts. General appeals to broad constitutional
13 principles, such as due process, equal protection, and the right to a fair trial, are
14 insufficient to establish a fair presentation of a federal constitutional claim. *Lyons v.*
15 *Crawford*, 232 F.3d 666, 669 (9th Cir.2000), *amended on other grounds*, 247 F.3d 904
16 (9th Cir. 2001); *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (insufficient for
17 prisoner to have made “a general appeal to a constitutional guarantee,” such as a naked
18 reference to “due process,” or to a “constitutional error” or a “fair trial”). Likewise, a
19 mere reference to the “Constitution of the United States” does not preserve a federal
20 claim. *Gray*, 518 U.S. at 162–63 (1996).
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23
24 Petitioner failed to fairly present Ground One as a federal claim in state court. If
25 Petitioner were to return to state court now to litigate this claim it would be found waived
26 and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal
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1 Procedure because it does not fall within an exception to preclusion. Ariz.R.Crim.P.
2 32.2(b); 32.1(d)-(h). This claim is technically exhausted but procedurally defaulted.
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4 Petitioner presents no cause for the default nor has he demonstrated that a fundamental
5 miscarriage of justice would occur if federal review of this claim is barred. Accordingly,
6 this claim is properly dismissed.

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8 Nonetheless, regardless of exhaustion, the Court considers the claim and finds, it
9 should be denied on the merits. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of
10 unexhausted claims on the merits); *see also Rhines v. Weber*, 544 U.S. 269, 277 (2005).

11 2. *Merits*

12
13 Petitioner’s due process argument is without merit. Petitioner challenges the
14 appellate court’s determination that there was sufficient evidence presented at trial to
15 support his conviction. Pursuant to *Jackson v. Virginia*, in determining a due process
16 claim based on the sufficiency of the evidence, “the critical inquiry ... is whether, after
17 viewing the evidence in the light most favorable to the prosecution, any rational trier of
18 fact could have found the essential elements of the crime beyond a reasonable doubt.”
19 443 U.S. 307, 318 (1979). “When we undertake collateral review of a state court decision
20 rejecting a claim of insufficiency of the evidence pursuant to 28 U.S.C. § 2254(d)(1),
21 however, our inquiry is even more limited; that is, we ask only whether the state court’s
22 decision was contrary to or reflected an unreasonable application of *Jackson* to the facts
23 of a particular case.” *Emery v. Clark*, 643 F.3d 1210, 1213–14 (9th Cir. 2011) (citing *Juan*
24 *H. v. Allen*, 408 F.3d 1262, 1274–75 (9th Cir. 2005)).
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1 Initially, to the extent Petitioner raises a state-law claim, the Arizona Constitution
2 affords Petitioner no relief in this federal habeas corpus proceeding. *Lewis v. Jeffers*, 497
3 U.S. 764, 780 (1990) (“[F]ederal habeas corpus relief does not lie for errors of state
4 law[.]”) (citations omitted); *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 630 & n.3
5 (1988) (recognizing that the federal habeas court is “not at liberty to depart from state
6 appellate court’s resolution of...issues of state law...” where the state supreme court
7 denied review of the underlying state case at bar.). “[A] state court’s interpretation of state
8 law ... binds a federal court sitting in habeas corpus” unless the state court’s decision
9 presents a violation of the Constitution or the laws or treaties of the United States.
10 *Bradshaw v. Richey*, 546 U.S. 74, 75 (2005); see *Swarthout v. Cooke*, — U.S. —, 131
11 S.Ct. 859 (2011) (extent of liberty interest in parole is a question of state law, which is
12 reviewable by a federal court only for a violation of the Due Process Clause). “Our
13 deference to the [state court] is suspended only upon a finding that the court’s
14 interpretation is untenable or amounts to a subterfuge to avoid federal review of a
15 constitutional violation.” *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1399 (9th Cir. 1989).

16 The court of appeals held that A.R.S. § 13-3554, the statute proscribing luring a
17 minor for sexual exploitation, does not require intent to photograph or otherwise record a
18 minor’s image, notwithstanding Petitioner’s argument that Ariz. Rev. Stat. Ann. § 13-
19 3553, the statute proscribing sexual exploitation of a minor, defines that offense in terms
20 of producing and distributing child pornography. The appellate court’s consideration of
21 the issue was thorough, its reasoning was sound and logical, and the court relied on well-
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1 established tenets of statutory construction under Arizona law: *See State v. Sepahi*, 206
2 Ariz. 321, ¶ 16 (2003) (“[A] statute's language is the most reliable index of its meaning”);
3 *State v. Brown*, 204 Ariz. 405, (App.2003) (Howard, J., concurring) (“Had the legislature
4 desired the facilitation portion of § 13–1805(I) to include a *mens rea* of intentionally, it
5 most likely would have utilized precise language defined by statute.”); *State v. Hauser*,
6 209 Ariz. 539, 542 (2005)(the heading of a statute is not part of the law and may only aid
7 in clarifying ambiguity if such exists); *see also* A.R.S. § 1–212 (headings not part of the
8 law, but merely for reference purposes). Since there is no evidence of state court
9 unreasonableness or subterfuge, this Court will not re-examine the state court's
10 interpretation of section 13-3554 as applied to Petitioner's conduct.

14 Insufficient evidence claims are reviewed by looking at the elements of the offense
15 under state law. *Emery*, 643 F.3d at 1214 (citing *Jackson*, 443 U.S. at 324 n. 16; *see also*
16 *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (in determining whether sufficient evidence
17 supports a state law statutory enhancement, federal courts are bound by “a state court's
18 interpretation of state law”).). At the time of Petitioner’s trial, the offense of luring a
19 minor for sexual exploitation was committed “by offering or soliciting sexual conduct
20 with another person knowing or having reason to know that the other person is a minor.”
21 A.R.S. § 13-3554. The appellate court held that “One of Hollenback's victims, Z., who
22 was eight at the time of the offenses, testified that Hollenback had asked him repeatedly
23 on multiple occasions to participate in oral sex. Thus, substantial evidence supported this
24 charge, and the trial court did not err in denying the Rule 20 motion.” (Doc. 1, Ex. A at ¶
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1 8.) Although Petitioner disagrees with the state court’s conclusion, this is not a case
2 where the state court failed “to take into account and reconcile key parts of the record....”
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4 *Taylor v. Maddox*, 366 F.3d at 1008. The record is clear that the state court considered
5 and weighed the relevant evidence in applying the applicable state law in rendering its
6 decision. Aside from the argument rejected by the state courts and not cognizable in this
7 habeas review, that the State mischarged the offense under A.R.S. § 13-3554 and the state
8 court’s misinterpreted that statute, Petitioner makes no argument that the prosecution
9 failed to prove the elements of the offense of luring a minor for sexual exploitation under
10 state law, as construed by the state courts. On such a record, the state-court decision was
11 not based on an unreasonable determination of the facts in light of the evidence presented
12 in the state proceeding.

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15 C. Ground Two

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17 In Ground Two, Petitioner contends that his due process rights were violated
18 because he was sentenced with an “under 12” enhancement “without proper notice of
19 such enhancement.” (Doc. 1 at 7.) Respondents argue that Petitioner failed to fairly
20 present Ground Two as a constitutional claim to the state courts on direct appeal, and thus
21 this claim is not exhausted. (Doc. 8 at 9-10). Respondents further contend that Ground
22 Two is procedurally defaulted because any attempt to return to state court to present that
23 claim would be futile because it would be procedurally barred pursuant to Arizona law.,
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25 (*Id.* at 10-11.) Alternatively, Respondents argue that Ground Two is without merit. (*Id.* at
26 15-18.)
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1. *Procedural Default*

Petitioner contends that he did not receive sufficient notice that, if convicted, he would be sentenced under A.R.S. § 13-604.01(A) or (B), in violation of his due process guarantee under the Fifth and Fourteenth Amendment of the U.S. Constitution. (Doc. 1 at 7; Memorandum at 5-6.)

Petitioner argued in his opening brief to the Arizona Court of Appeals, that, under *State v. Guytan*, 192 Ariz. 514 (App.1998), when the state offers no excuse for an untimely sentence enhancement allegation, and when there is no citation in the indictment to the enhancement provision, it is error to sentence the defendant using the enhancement. (Doc. 8, Ex. B at 10-11.)

Respondents assert that Petitioner's federal claims are procedurally defaulted and barred from habeas corpus review. As the appellate court found, Petitioner's argument relied entirely on the state court of appeals case *State v. Guytan*, 192 Ariz. at 595-96, which held that permitting an amendment to the indictment to allege gang motivation as a potential sentence enhancement nine days after the jury had been impaneled was improper because the request to amend had been untimely under Rule 16.1, Ariz.R.Crim.P. After arguing at length how the indictment was insufficient under *Guytan*, *supra*, and Rule 16.1, Petitioner concluded his argument, mentioning in closing that: "The trial court abused its discretion in placing an interrogatory before the jury and using that finding to enhance [Petitioner's] sentence under § 13-604.01's more severe penalty provisions and violated Petitioner's right to due process. U.S. Const., Amends. 5 and 14;

1 Ariz. Const., art. 2, §§1 and 4.” (Doc. 8, Ex. B at 13.)

2 Petitioner's passing reference to “due process” is not sufficient to fairly present a
3 federal claim to the state courts. *Lyons v. Crawford*, 232 F.3d at 669; *Shumway*, 223 F.3d
4 at 987. Petitioner failed to fairly present Ground One as a federal claim in state court. If
5 Petitioner were to return to state court now to litigate this claim it would be found waived
6 and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal
7 Procedure because it does not fall within an exception to preclusion. Ariz.R.Crim.P.
8 32.2(b); 32.1(d)-(h). This claim is technically exhausted but procedurally defaulted.
9 Petitioner presents no cause for the default nor has he demonstrated that a fundamental
10 miscarriage of justice would occur if federal review of this claim is barred, accordingly,
11 this claim is properly dismissed.
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15 Nonetheless, regardless of exhaustion, the Court considers the claim and finds it
16 should be denied on the merits. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of
17 unexhausted claims on the merits); *see also Rhines*, 544 U.S. at 277.
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19 2. *Merits*

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21 Petitioner’s due process argument is without merit. Petitioner challenges the
22 appellate court’s determination that the State’s separate allegations that each offense was
23 a dangerous crime against children, and the indictment which included a reference to §
24 13-604.01, the dangerous crimes against children statute, which provides an enhanced
25 penalty when a defendant is convicted of sexual conduct with a minor under twelve years
26 of age, is adequate notice of the State’s intent to enhance Petitioner’s sentence under that
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1 statute. The trial court granted the State’s request, over Petitioner’s objection based on
2 insufficient notice, to include an interrogatory on the verdict form for Count 2 (sexual
3 conduct with a minor) asking the jury to find whether the victim was under 12 years of
4 age. (Doc. 8, Reporter’s Transcript (“R.T.” 2/20/04 at 67–69, 79.) After the jury made
5 this finding, Petitioner was sentenced accordingly, and the state appellate court affirmed
6 his enhanced sentence on count 2. (Doc. 1, Ex. A at ¶¶ 9- 11.) The state appellate court
7 found: “Here, the state separately alleged each offense was a dangerous crime against
8 children and each count of the indictment included a reference to § 13-604.01, the
9 dangerous crimes against children statute, which provides an enhanced penalty when a
10 defendant is convicted of sexual conduct with a minor twelve years of age or younger.”
11 (*Id.* at ¶ 10.) The appellate court, relying on state supreme court precedent, held that the
12 indictments’ reference to the number of the statute providing for enhanced punishment
13 was adequate notice of the State’s intent to enhance the defendant’s sentence under that
14 statute. (*See* Doc. 8, Ex. A, ¶ 11)(citing *State v. Waggoner*, 144 Ariz. 237, 239 (1985);
15 *State v. Barrett*, 132 Ariz. 88, 89 (1982)) (“Th[e] recital of A.R.S. § 13-604 [in the
16 information] was sufficient to put [defendant] on notice that the prosecutor would seek an
17 enhanced sentence.”), *overruled on other grounds by State v. Burge*, 167 Ariz. 25
18 (1990)).

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24 First, it is the Fourteenth Amendment, not the Fifth Amendment that protects a
25 person against deprivations of due process by a state. *See* U.S. Const. amend XIV, § 1
26 (“nor shall any state deprive any person of life, liberty, or property without due process of
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1 law.”); *Castillo v. McFadden*, 399 F.3d 993, 399 F. 3d at 1002 n. 5 (9th Cir. 2005) (“The
2 Fifth Amendment prohibits the federal government from depriving persons of due
3 process, while the Fourteenth Amendment explicitly prohibits deprivations without due
4 process by the several States.”). Because the Fifth Amendment Due Process Clause does
5 not provide a cognizable ground for relief regarding Petitioner's state court conviction,
6 his allegations under the Fifth Amendment Due Process Clause should be dismissed.
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9 Next, as Respondents correctly note in their Answer, notwithstanding Petitioner’s
10 denial that he has a “6th Amendment ‘Notice’ issue” (Doc. 9 at 5), Petitioner’s argument
11 appears to allege a violation of his Sixth Amendment right “to be informed of the nature
12 and cause of the accusation” against him. U.S. Const. amend. VI. It is clearly established
13 federal law under the Constitution that a criminal defendant have “reasonable notice of a
14 charge against him, and an opportunity to be heard in his defense.” *In re Oliver*, 333 U.S.
15 257, 273 (1948); *Cole v. Arkansas*, 333 U.S. 196, 201(1948); *Gault v. Lewis*, 489 F.3d
16 993, 1002 (9th Cir. 2007) (criminal defendant has fundamental right to notice of charges
17 “to permit adequate preparation of a defense”). The Due Process Clause of the Fourteenth
18 Amendment renders this Sixth Amendment guarantee applicable to the states. *Gault v.*
19 *Lewis*, 489 F.3d at 1003; *see also Cole*, 333 U.S. at 201 (“No principle of procedural due
20 process is more clearly established than that notice of the specific charge, and a chance to
21 be heard in a trial of the issues raised by that charge, if desired, are among the
22 constitutional rights of every accused in a criminal proceeding in all courts, state or
23 federal.”).
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1 In determining whether a petitioner received fair notice of the charges against him,
2 the court “begin[s] by analyzing the content of the information.” *Gault*, 489 F.3d at 1003.
3
4 Additionally, absent clearly established Supreme Court precedent on point, the court of
5 appeals did not unreasonably apply federal law in relying on additional, noncharging
6 sources to conclude that Petitioner received fair notice. *See Wright v. Van Patten*, 552
7 U.S. 120, 125–26 (2008) (holding that state court could not have unreasonably applied
8 federal law if no clearly contrary Supreme Court precedent existed); *see also Gault*, 489
9 F.3d at 1010 (assuming without deciding that other sources, such as jury instructions,
10 may be examined for evidence of notice to a petitioner).
11

12 Petitioner argues that the indictment expressly alleged that the minor victim was
13 “under 15”, a term of art implicating a lesser sentencing range, and thus, because of this
14 express language in the indictment, he was put on notice that he could be sentenced only
15 pursuant to A.R.S. § 13-604.01(C)(minor victims between the ages of twelve and
16 fourteen) and not under A.R.S. §§ 13-604.01(A) or (B)(minor victims under the age of
17 twelve), which were not specifically alleged. (Doc. 1, Memorandum at 5.) Contrary to
18 Petitioner’s assertion that this language indicates a lesser sentencing range, the “under
19 fifteen years of age” language in the indictment indicates that, under the substantive
20 charging statute, A.R.S. § 13-1405(B), the defendant is charged with a class 2 felony
21 offense, subject to the further sentencing enhancements of § 13-604.01. *See* A.R.S. § 13-
22 1405(B)(“Sexual conduct with a minor who is under fifteen years of age is a class 2
23 felony and is punishable pursuant to § 13-604.01. Sexual conduct with a minor who is at
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1 least fifteen years of age is a class 6 felony.”) The substantive offense classifies the
2 felony no differently for an offense if the victim is under fifteen, or under twelve. Both
3 are class 2 felony offenses. *See* A.R.S. § 13-1405(B). On the other hand, the sentencing
4 enhancements under A.R.S. § 13-604-01, which was alleged both in the indictment and in
5 the allegation of dangerous crimes against children, contain three specific subsections
6 that apply to the substantive offense of sexual conduct with a minor, but distinguish
7 between defendants who commit the offense against a minor who is under twelve years
8 of age (A.R.S. §§ 13-604.01(A) and (B)) and defendants who commit sexual conduct
9 with minors who are twelve, thirteen or fourteen years of age (A.R.S. § 13-604.01(C)).
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13 In *Gault*, the Ninth Circuit found a petitioner’s right to notice was violated when
14 the petitioner was charged with a sentencing enhancement under one subdivision of a
15 statute, but the jury was provided with verdict forms, and his sentence was enhanced
16 under a different subdivision of the statute, which required additional elements and
17 carried a much harsher penalty. 489 F.3d at 1008. The instant case is not like *Gault*. The
18 State did not allege the wrong subsection of the sentencing enhancement statute. As noted
19 above, the references to the “under fifteen” language implicated the felony classification
20 of the substantive offense which was a necessary prerequisite to determine which
21 subsection of the sentencing enhancement statute to apply. *Compare* A.R.S. §§ 13-
22 604.01(A) and (B) *with* A.R.S. § 13-604.01(C). The State did not allege a particular
23 subsection of the sentencing enhancement statute and mislead Petitioner, as in *Gault*;
24 rather the State alleged the sentencing enhancement statute generally, referring to no
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1 subsection at all. The appellate court found that Petitioner's indictment included citations
2 to §13-604.01, and the state separately alleged each offense was a dangerous crime
3 against children and each count of the indictment included a reference to § 13-604.01, the
4 dangerous crimes against children statute, and that, under Arizona law, this was sufficient
5 notice. The appellate court's decision was not contrary to, or involved an unreasonable
6 application of, clearly established Federal law under § 2254(d)(1). Nor, on this record,
7 did the state court's proceeding result in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented.
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11 D. Grounds Three and Four – IAC claim
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13 Petitioner contends in Ground Three that he received ineffective assistance of
14 counsel in violation of the Sixth and Fourteenth Amendments when his trial counsel
15 failed to object to the State's inappropriate use of hearsay evidence to impeach its own
16 witness. (Doc. 1 at 8.) Respondents assert that because trial counsel was not obligated to
17 object to the trial court's proper admission of the statements, the appellate court
18 reasonably determined that counsel's failure to object was not deficient performance
19 which fell below an objective standard of reasonableness. (Doc. 8 at 23.)
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21
22 Petitioner contends in Ground Four that that he received ineffective assistance of
23 counsel in violation of the Sixth and Fourteenth Amendments when his trial counsel
24 failed to request a jury instruction on the lesser included offense of attempted child
25 molestation in Count One. (Doc. 1 at 9.) Respondents argue that Petitioner cannot
26 overcome the presumption that, under the circumstances, counsel's decision not to seek a
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1 lesser included offense instruction might be considered sound trial strategy, and thus, the
2 state court’s decision on his IAC claim was reasonable. (Doc. 8 at 25.)

3
4 *1. Exhaustion/Procedural Default*

5 Respondents acknowledge that Petitioner presented an IAC claim in the state trial
6 and appellate courts, which claim raised the same issue as those he raises in Grounds
7 Three and Four of this habeas petition. (Doc. 8 at 20, 23.) The Court finds Petitioner has
8 properly exhausted Grounds Three and Four, and addresses the merits of the claims
9 below.
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12 *2. Merits*

13 To prevail on a claim of ineffective assistance of counsel, Petitioner must satisfy
14 two separate requirements: he must (1) show that counsel’s performance fell below
15 objective standards of reasonableness and “outside the wide range of professionally
16 competent assistance,” and (2) establish that counsel’s performance prejudiced Petitioner
17 by creating “a reasonable probability that absent the errors the fact finder would have had
18 a reasonable doubt respecting guilt.” *Strickland v. Washington*, 466 U.S. 668, 687–94
19 (1984); *see also Williams*, 529 U.S. at 390; *Kimmelman v. Morrison*, 477 U.S. 365, 375
20 (1986). *Strickland* is the clearly established law for IAC claims. *See Harrington v.*
21 *Richter*, ___ U.S. ___, 131 S. Ct. 770, 780 (2011).
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25 Regarding the performance prong, a reviewing court engages a strong presumption
26 that counsel rendered adequate assistance, and exercised reasonable professional
27 judgment in making decisions. *See id.* at 690. “[A] fair assessment of attorney
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1 performance requires that every effort be made to eliminate the distorting effects of
2 hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to
3 evaluate the conduct from counsel's perspective at the time." *Bonin v. Calderon*, 59 F.3d
4 815, 833 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 689). Moreover, review of
5 counsel's performance under *Strickland* is "extremely limited": "The test has nothing to
6 do with what the best lawyers would have done. Nor is the test even what most good
7 lawyers would have done. We ask only whether some reasonable lawyer at the trial could
8 have acted, in the circumstances, as defense counsel acted at trial." *Coleman v. Calderon*,
9 150 F.3d 1105, 1113 (9th Cir.), *judgment rev'd on other grounds*, 525 U.S. 141 (1998).
10 Thus, a court "must judge the reasonableness of counsel's challenged conduct on the
11 facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466
12 U.S. at 690.

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17 If the prisoner is able to satisfy the performance prong, he must also establish
18 prejudice. *See id.* at 691-92; *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000) (burden
19 is on defendant to show prejudice). To establish prejudice, a prisoner must demonstrate a
20 "reasonable probability that, but for counsel's unprofessional errors, the result of the
21 proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable
22 probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* A
23 court need not determine whether counsel's performance was deficient before examining
24 whether prejudice resulted from the alleged deficiencies. *See Robbins*, 528 U.S. at 286
25 n.14. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of
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1 sufficient prejudice, which we expect will often be so, that course should be followed.”

2 *Id.* (quoting *Strickland*, 466 U.S. at 697).

3
4 In reviewing a state court’s resolution of an IAC claim, the Court considers
5 whether the state court applied *Strickland* unreasonably:

6 For [a petitioner] to succeed [on an ineffective assistance of counsel claim],
7 ... he must do more than show that he would have satisfied *Strickland’s* test
8 if his claim were being analyzed in the first instance, because under §
9 2254(d)(1), it is not enough to convince a federal habeas court that, in its
10 independent judgment, the state-court decision applied *Strickland*
11 incorrectly. Rather, he must show that the [state court] applied *Strickland* to
12 the facts of his case in an objectively unreasonable manner.

13 *Bell v. Cone*, 535 U.S. 685, 698-99 (2002) (citations omitted); *see also Woodford v.*
14 *Visciotti*, 537 U.S. at 24-25 (“Under § 2254(d)’s ‘unreasonable application’ clause, a
15 federal habeas court may not issue the writ simply because that court concludes in its
16 independent judgment that the state-court decision applied *Strickland* incorrectly. Rather,
17 it is the habeas applicant’s burden to show that the state court applied *Strickland* to the
18 facts of his case in an objectively unreasonable manner.”) (citations omitted).

19 Having reviewed the record, the Court finds that the state court did not
20 unreasonably apply *Strickland* and denies Petitioner’s claim as asserted in Ground Three,
21 but finds that the state court’s factual determination in Ground Four was unreasonable,
22 and grants relief as to Ground Four.

23
24 *3. Trial Court Proceedings*

25
26 During trial, Officer Wright testified that he had spoken with J. while investigating
27 the claims of molestation. (Doc. 8, Ex. F, R.T. 2/18/04 at 155-57.) When the prosecutor
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1 asked Wright what J. had told him, defense counsel objected because it was not clear at
2 that point whether J. was going to testify at trial. (*Id.* at 173.) The trial court sustained the
3 objection. (*Id.* at 174.) Later at trial J. testified that Hollenback had “tried” to touch him.
4 (Doc. 8, Ex. G, R.T. 2/19/04 at 125.) He indicated that he had told the policeman about
5 the incident. (*Id.* at 130.) He also remembered being interviewed the same night at a
6 different location. (*Id.* at 117, 120.)
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9 Throughout the prosecutor’s questioning, however, J. was unresponsive, did not
10 acknowledge that Petitioner had actually touched him, and repeatedly stated he did not
11 know or remember events. (*Id.* at 121-29.) The prosecutor called Detective Mann for
12 purposes of impeaching J’s testimony. (*Id.* at 133.) Mann had interviewed J. at the
13 Children’s Advocacy Center the day of Petitioner’s arrest. (*Id.* at 207.) Mann testified
14 that J. had indicated through words and demonstration that Petitioner had touched J.’s
15 groin with his hand over J.’s clothes using a squeezing motion. (Answer, Ex. H., R.T.
16 2/20/04 at 21-24.) The prosecutor also recalled Officer Wright, and Wright testified that
17 J. told him that Petitioner had “touched his pee-pee with his clothing on.” (*Id.* at 87.)
18 Petitioner’s counsel did not object to the State’s use of Mann and Wright’s impeachment
19 testimony. Defense counsel did, however, cross-examine both Mann and Wright on the
20 statements they took. (*Id.* at 35-50, 88.)
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24 4. *Ground Three*

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26 Petitioner argued in his PCR petition that defense counsel failed to properly object
27 to Officer Wright and Detective Mann’s hearsay testimony, thus allowing the statements
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1 which were admitted under the guise of impeachment evidence to be used as substantive
2 evidence to support the charge of child molestation. (Doc. 8, Ex. D at 7-.) The trial court,
3 ruling on the PCR petition, found that Mann's and Wright's impeachment testimony was
4 admissible under Ariz. R. Evid. 801(d)(1)(A) as evidence of J's prior inconsistent
5 statements. (Petition, Ex. C at 3-4.) Following Arizona law, the trial court also found that
6 the prior inconsistent statement could be considered substantively as well as for
7 impeachment. (*Id.*)(citing *State v. Skinner*, 515 P.2d 880, 887 (Ariz. 1973)). Further,
8 using the five factors set forth in *State v. Allred*, 655 P.2d 1326, 1330 (Ariz. 1982), the
9 court ruled that the probative value of the officers' testimony was not substantially
10 outweighed by the danger of prejudice. (*Id.*) Because the evidence was admissible, the
11 trial court denied relief on Petitioner's claim that counsel was ineffective for not
12 objecting. (*Id.* at 5.)

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17 In his petition for review to the appellate court, Petitioner conceded that the trial
18 court was correct that Rule 801(d)(1)(A), Ariz.R.Evid., generally permits a party to
19 impeach the party's own witness with prior inconsistent statements, but argued that the
20 court erred when it determined "the evidence was admissible under Rule 801(d)(1)(A)
21 and was not unfairly prejudicial under Rule 403, [Ariz.R.Evid.]." (Answer, Ex. E. at 10.)
22 Petitioner argued that the trial court did not address the fact that J.'s out-of-court
23 statements were the only evidence of Petitioner's guilt on Count One of the indictment,
24 thus, their introduction as impeachment evidence is prohibited by caselaw. (*Id.*)(citing
25 *State v. Cruz*, 128 Ariz. 538 (1981); *State v. Allred*, 135 Ariz. 274 (1982); *State v.*
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1 *Thomas*, 148 Ariz. 225 (1986); and *State v. Allen*, 157 Ariz. 165 (1988)). The Arizona
2 Court of Appeals reviewed the trial court’s minute entry, finding that the order
3 demonstrated the court was aware of and considered the appropriate factors in
4 determining whether it would have permitted the testimony if counsel had objected,
5 specifically applying the test set forth in *Allred*, *supra*. (Petition, Ex. D at 5) The
6 appellate court agreed with the trial court’s analysis, finding that Detective Mann’s
7 testimony was not the only substantive evidence of the offense; Z’s testimony provided,
8 at the least, circumstantial evidence, and at best, direct, albeit equivocal, evidence. The
9 appellate court concluded that counsel’s performance was not deficient, nor was it
10 prejudicial. (*Id.* at 5-6.)

14 As indicated, in addressing this IAC claim, the state court found, assuming that
15 counsel had performed deficiently, Petitioner was not prejudiced by counsel’s
16 performance. (Petition, Ex. D. at 6) Specifically, the appellate court stated, “the court
17 would not have abused its discretion by overruling an objection, had counsel made one.
18 ... Therefore, counsel’s performance was not deficient, nor was it prejudicial.” (*Id.*)
19 (internal citation omitted). In making this determination, the court reasonably applied
20 *Strickland*. Because the underlying issue was meritless, and the evidence was properly
21 admitted, Petitioner cannot show that he was prejudiced by the manner in which counsel
22 litigated this issue. *See Kimmelman*, 477 U.S. at 375 (1986); *Wilson v. Henry*, 185 F.3d
23 986, 990 (9th Cir. 1999) (counsel did not perform deficiently by failing to move for
24 exclusion of defendant’s prior bad acts because the evidence “was almost certainly
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1 admissible”). Petitioner is not entitled to relief on Ground Three.

2 5. *Ground Four*

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4 Petitioner argued to the trial court in his PCR petition that J.’s testimony supplied
5 enough facts to warrant a jury instruction on the lesser included offense of attempted
6 child molestation. (Doc. 8, Ex. D at 20-21.) Petitioner further asserted that he was
7 prejudiced by trial counsel’s ineffectiveness in failing to request the lesser included
8 offense. (*Id.*) The trial court conceded that the instruction would have been supported by
9 J’s testimony, but found that trial counsel was not ineffective for failing to request the
10 instruction because it would have been entirely inconsistent with the defense theory that
11 “Robert Hollenback did nothing” (Doc. 1, Ex. C at 5.) Given the theory of the defense
12 that Petitioner was innocent of any crime, the trial court reasoned that it was within trial
13 counsel’s discretion to not seek an instruction inconsistent with this defense, and thus
14 trial counsel’s performance was not deficient. (*Id.*)(citing *State v. Jerousek*, 121 Ariz. 420
15 (1979)).

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19 Petitioner disagreed with the trial court’s ruling, arguing in his petition for review
20 that requesting a lesser-included instruction would not have been inconsistent with the
21 defense strategy. (Doc. 8, Ex. E at 16-17.) Petitioner argued that even if it were
22 inconsistent,
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24 . . . the only way counsel’s failure to request the instruction could have
25 been a legitimate strategic choice would be if the inconsistency would have
26 been apparent to the jury, thus undermining the defense of actual
27 innocence. This, of course, could not have happened. All argument by
28 counsel regarding jury instructions takes place out of the presence of the
jury. If defense counsel had believed the lesser-included instruction

1 undermined his defense strategy, he could have simply omitted any
2 reference to it from his closing argument. The mere presence of the
3 instruction could not possibly have tainted the defense in the eyes of the
4 jury.

5 (Doc. 8, Ex. E at 16.) Finally, Petitioner argued that defense counsel’s failure to ask for
6 the lesser-included instruction was not a strategic choice. (*Id.*)

7 The appellate court rejected Petitioner’s argument, finding that the trial court
8 believed counsel’s decision not to request the instruction was likely a reasonable tactical
9 decision based on the asserted defense that nothing had occurred at all. (Doc. 1, Ex. D. at
10 6-7)(citing *State v. Webb*, 164 Ariz. 348 (1990) (“Actions of defense counsel which
11 appear to be trial tactics will not support an allegation of ineffective assistance of
12 counsel.”)).

13
14 Federal courts may only grant habeas relief in cases where the state court decision
15 “was based on an unreasonable determination of the facts in light of the evidence
16 presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2); *Taylor*, 366 F.3d at
17 999-1000 (stating that § 2254(d)(2) “applies most readily to situations where petitioner
18 challenges the state court's findings based entirely on the state record”); *see also Wood v.*
19 *Allen*, 588 U.S. 290, (2010) (noting that the appellate courts have split on whether a state
20 court's factual determination should be reviewed under 28 U.S.C. § 2254(d)(2) or §
21 2254(e)(1)). The Court finds that the state court's factual finding that trial counsel made a
22 tactical decision in this case is “unreasonable.”

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24 “[A] state-court factual determination is not unreasonable merely because the
25 federal habeas court would have reached a different conclusion in the first instance.”
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1 Wood, 558 U.S. at 301. However, “[a] decision cannot be fairly characterized as
2 “strategic” unless it is a conscious choice between two legitimate and rational
3 alternatives. It must be borne of deliberation and not happenstance, inattention, or
4 neglect.” *Id.* at 307 (Stevens, J., dissenting) (citing *Wiggins v. Smith*, 539 U.S. 510, 526
5 (2003) (concluding that counsel's “failure to investigate thoroughly resulted from
6 inattention, not reasoned strategic judgment”); *Strickland*, 466 U.S. at 690–91). As the
7 Supreme Court stated in *Strickland*, and later reiterated in *Wiggins*, “strategic choices
8 made after thorough investigation of law and facts relevant to plausible options are
9 virtually unchallengeable[.]” *Strickland*, 466 U.S. at 690-91; *Wiggins*, 539 U.S. at 510.

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13 The Court finds that the state court record is void of any evidence demonstrating
14 that counsel's failure to request a lesser included instruction was the result of a deliberate
15 decision. As the Supreme Court explained in *Wood*, “Whether the state court reasonably
16 determined that there was a strategic decision under § 2254(d)(2) is a different question
17 from whether the strategic decision itself was a reasonable exercise of professional
18 judgment under *Strickland* or whether the application of *Strickland* was reasonable under
19 § 2254(d)(1).” 558 U.S. at 304. The trial court stated that “[g]iven the theory of the
20 defense, that Petitioner was innocent of any crime, it was well within trial counsel’s
21 discretion to not seek an instruction inconsistent with this defense.” (Doc. 1, Ex. C at 23.)
22 The appellate court concluded based on this finding that the trial court believed counsel’s
23 decision not to request the instruction was “likely a reasonable tactical decision based on
24 the asserted defense that nothing had occurred at all.” (*Id.*, Ex. D at 7.)
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1 The Court finds no support for the state court's factual determination that counsel
2 made a tactical or strategic choice to not request the lesser included jury instruction of
3 attempted child molestation. *Cf. Wood*, 558 U.S. at 301-302 (“This evidence in the state-
4 court record can fairly be read to support the [state] court's factual determination that
5 counsel's failure to pursue or present evidence of Wood's mental deficiencies was not
6 mere oversight or neglect but was instead the result of a deliberate decision to focus on
7 other defenses.”). First, the Court rejects the trial court’s attempts to characterize
8 counsel’s choice as strategic simply because it was the only legitimate and rational choice
9 counsel could have made because a lesser included jury instruction would have been
10 inconsistent with an innocence defense. As Petitioner argued in his Petition, the evidence
11 supported the jury instruction, and Petitioner would not have to draw attention to the
12 instruction by arguing it to the jury. The Court finds no support for the trial court’s
13 conclusion that innocence or insufficiency of the evidence theories of defense (*see*
14 Answer, Ex. H, Reporter’s Transcript, 2/20/2004 at 141, ll. 23-25) are *per se* inconsistent
15 with the lesser included instruction of attempted child molestation. *See State v. Wall*, 212
16 Ariz. 1, 5-6 (2006)(there is no bright-line rule under Arizona law that a lesser-included
17 offense instruction is never proper if a defendant has asserted an all-or-nothing defense).
18 [A] lesser-included offense instruction is not appropriate “when the ‘defendant's theory of
19 the case denies all involvement in the [offense], and [when] no evidence provides a basis
20 for [the lesser included offense], ... [and] the record is such that defendant is either guilty
21 of the crime charged or not guilty.’ ” *State v. Van Adams*, 194 Ariz. 408, 414

1 (1999)(quoting *State v. Salazar*, 173 Ariz. 399, 408 (1992)). (emphasis added); *see also*
2 *State v. Whaley*, 2011 WL 92990 (Ariz.App. 2011)(rejecting State’s argument that court
3 correctly refused attempt instruction because defendant’s only defense was that he did not
4 engage in any sexual misconduct whatsoever with child; noting that a defendant’s all-or-
5 nothing defense does not preclude a lesser-included offense instruction when the record
6 contains evidence warranting the instruction). Second, the Court finds that there is no
7 evidentiary basis in the state court record for such a finding: there was no PCR hearing in
8 state court; counsel submitted no affidavit explaining his decision; and the transcripts
9 submitted with this Petition contain no discussion that sheds any light on counsel’s
10 decision-making process. The Court agrees with Respondents that, given the facts of the
11 case, counsel might have made a tactical decision to pursue an all-or-nothing defense;
12 that is, the absence of the instruction placed Petitioner’s jury in the position where it
13 might acquit him rather than convict him of the completed offense. As compelling and
14 reasonable as this might sound in hindsight, however, there is nothing in the record
15 before this Court that suggests that counsel actually made this strategic decision. *See*
16 *Debarge v. Stewart*, 39 Fed.Appx. 577 (9th Cir. 2002)(Defense counsel’s failure to
17 request jury instruction on lesser included offenses to the charge of intentional child
18 abuse was objectively unreasonable where failure to request the instructions was not a
19 strategic choice, but the result of counsel’s failure to understand the law). An equally
20 plausible strategic position, and the reason for the rule requiring instruction on lesser-
21 included offenses in Arizona, is that a jury will convict a defendant of a crime even
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1 though the evidence “remains in doubt, simply because he “is plainly guilty of some
2 offense.” *Wall*, 212 Ariz. at 4. (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)). The
3 Court finds that the state court record is void of any evidence demonstrating that
4 counsel's failure to request the lesser included jury instruction was the result of a
5 deliberate decision, and finds the trial court’s finding an unreasonable factual
6 determination based on flawed speculation that defense counsel actually made this
7 reasoned decision.
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10 To prevail in this action, however, Petitioner must demonstrate not only that
11 Petitioner performed deficiently, but also that he was prejudiced as a result of the
12 deficient performance. A lesser-included offense instruction is required if the jury could
13 “find (a) that the State failed to prove an element of the greater offense and (b) that the
14 evidence is sufficient to support a conviction on the lesser offense.” *Wall*, 212 Ariz. At 4
15 (citing *State v. Caldera*, 141 Ariz. 634, 636-37 (1984). Because the trial court made a
16 finding that the instruction would have been supported by J’s testimony, under Arizona
17 law, and this finding is uncontested, there is no question that the lesser-included
18 instruction would have been given if counsel had requested it. Thus, Petitioner was
19 prejudiced by counsel’s failure to request the instruction.
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23 Accordingly, the Court finds that the state court’s determination that trial
24 counsel’s performance was not deficient was based on an unreasonable determination of
25 facts. Because the trial court concedes that the instruction would have been given, the
26 prejudice prong has been established. Because the jury necessarily found all the facts
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1 essential to convict Petitioner for a violation of attempted child molestation when it found
2 all the facts necessary to convict Petitioner of the completed offense, the state court can
3 modify the judgment from a conviction of the completed offense, to reflect the conviction
4 of the proven, lesser-included offense of attempt, and resentence accordingly. *See e.g.*
5 *State v. Gray*, 227 Ariz. 424, 429 (App. 2011)(citing *State v. Rowland*, 12 Ariz.App. 437
6 (1970); *State v. Garcia*, 138 Ariz. 211 (App. 1983). Accordingly, the proper remedy for
7 this Court is to order that the state court immediately vacate Petitioner’s sentence, or to
8 postpone such relief for a reasonable period to allow the state court to vacate the
9 conviction on the completed offense and enter conviction of the attempted offense and
10 resentence the Petitioner. *See Douglas v. Jacquez*, 626 F.3d 501, 505 (2010)(Where the
11 state court “has the power to correct the constitutional error ... it should be given the
12 opportunity to do so.”).

13 14 15 16 17 **IV. CONCLUSION**

18 The Court finds that Petitioner procedurally defaulted Grounds One and Two of
19 his Petition. Nonetheless, considering the merits of the claim, the Court finds Grounds
20 One and Two, as well as Petitioner’s IAC claim raised in Ground Three, are without
21 merit and are denied with prejudice. The Court finds that Petitioner has raised a
22 meritorious claim as to Ground Four, however, and grants relief as to this claim only.
23 Accordingly,
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26 **IT IS HEREBY ORDERED** that the Petition (Doc. 1) is **GRANTED IN PART**
27 **AND DENIED IN PART.**
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1 IT IS FURTHER ORDERED that Grounds One, Two and Three of the Petition
2 (Doc. 1) are DENIED WITH PREJUDICE.

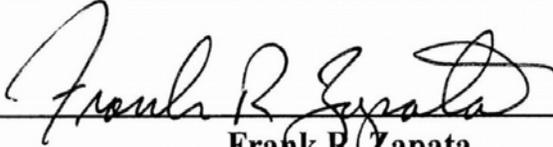
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4 IT IS FURTHER ORDERED that Ground Four of the Petition is GRANTED to
5 the extent that the state court is DIRECTED to vacate Count 1 of Petitioner's conviction,
6 molestation of a child, under § 13-1410, unless, within 90 days from the entry of
7 Judgment, the state court modifies the state court judgment and conviction by vacating
8 the conviction of the completed offense of molestation of child in Count 1 and entering
9 conviction of the attempted molestation of a child molestation and resentsences Petitioner
10 accordingly.
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13 IT IS FURTHER ORDERED that the Clerk of the Court shall enter Judgment
14 accordingly.

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16 IT IS FURTHER ORDERED that, if Petitioner appeals the denial of his petition
17 for habeas relief, any request for certificate of appealability is denied based on the
18 Court's determination of the claims presented on the merits and that Petitioner has failed
19 to make the requisite substantial showing of a denial of a constitutional right on the
20 grounds presented. See 28. U.S.C. § 2253(c)
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22 Dated this 19th day of September, 2013.

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Frank R. Zapata
Senior United States District Judge