No. 22-_____

IN THE

Supreme Court of the United States

WILLIAM MICHAEL MEYER,

Petitioner,

v.

RYAN THORNELL, Director of the Arizona Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM MICHAEL MEYER, *Petitioner - Appellant*, vs. ATTORNEY GENERAL OF THE STATE OF ARIZONA; DAVID SHINN, DIRECTOR, *Respondents - Appellants*, and CHARLES L. RYAN, *Respondent*.	No. 21-15374 D.C. No. 3:19-cv-8112-PCT-JAT MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, Senior District Judge, Presiding

Argued and Submitted September 20, 2022
San Francisco, California

Filed October 4, 2022

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: GRABER, FRIEDLAND, and SUNG, Circuit Judges.
Concurrence by Judge FRIEDLAND.

Petitioner William Meyer appeals from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

Meyer was convicted of twenty-three counts of sexual exploitation of a minor, in violation of Ariz. Rev. Stat. § 13-3553(A)(2), after being found in possession of twenty-three images of child pornography on his desktop computer. Because the children in the images were under the age of fifteen, Meyer was subject to an enhanced sentencing scheme under which each count carries a mandatory minimum sentence of ten years, to be served consecutively, without the possibility of a suspended sentence, probation, pardon, or early release. Ariz. Rev. Stat. §§ 13-3553(C), 13-705(E), 13-705(I), 13-705(N); *see State v. Berger*, 134 P.3d 378, 379 (Ariz. 2006). In accordance with that sentencing scheme, Meyer received a total of 230 years in prison.

Meyer appealed his conviction to the Arizona Court of Appeals, arguing, among other things, that his cumulative 230-year sentence violated the Eighth Amendment because it was grossly disproportionate to his crime. Applying *State v. Berger*, the court held that Meyer's sentences did not violate the Eighth Amendment. Meyer petitioned for review by the Arizona Supreme Court, which the court denied, and he filed two unsuccessful petitions for state post-conviction relief based primarily on ineffective assistance of counsel. He then renewed his Eighth Amendment claim in federal district court in this Section 2254 petition for writ of habeas corpus.

We review de novo the district court's denial of a Section 2254 habeas petition. *Cain v. Chappell*, 870 F.3d 1003, 1012 (9th Cir. 2017). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts may grant habeas relief on a claim adjudicated on the merits in state court proceedings only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or if it was "based on an unreasonable determination of the facts in light of the evidence presented" in state court, *id.* § 2254(d)(2).

1. The Arizona Court of Appeals concluded that "Meyer's sentences do not violate the Eighth Amendment." That conclusion rejected Meyer's Eighth Amendment claim on the merits. Accordingly, AEDPA deference applies. *See Cullen v. Pinholster*, 563 U.S. 170, 187 (2011) ("Section 2254(d) applies even where there has been a summary denial.").

2. Applying deference under AEDPA, we can grant relief on Meyer's claim only if the Arizona Court of Appeals' decision rejecting his cumulative-impact argument was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Meyer argues that the Arizona Court of Appeals violated clearly established Supreme Court precedent by declining to consider whether his sentence was grossly disproportionate when viewed in the aggregate. But as another panel of our court recently held, "[t]here is no clearly established law from the Supreme Court on whether Eighth Amendment sentence proportionality must be analyzed on a cumulative or individual basis when a defendant is sentenced on multiple offenses." *Patsalis v. Shinn*, No. 20-16800, 2022 WL 4076129, at *7, --- F.4th --- (9th Cir.

Sept. 6, 2022). And there is no possibility all fairminded jurists would agree "that the Arizona Court of Appeals' decision conflicts with the Supreme Court's clearly established precedents,… given the limited Supreme Court precedent regarding the prohibition against disproportionality of a sentence to a term of years." *Id.* at *8 (internal quotation marks omitted). We are therefore unable to say that the Arizona Court of Appeals' decision was contrary to or unreasonably applied "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d), and cannot grant relief on Meyer's claim.

AFFIRMED.

FRIEDLAND, Circuit Judge, with whom SUNG, Circuit Judge, joins concurring:

On April 10, 2010, then-26-year-old William Meyer downloaded twenty-three images of child pornography, apparently within the span of a few minutes. A month and a half later, he was indicted on twenty-three separate counts of sexual exploitation of a minor under the age of fifteen. But the prosecutor offered Meyer a deal: instead of standing trial for twenty-three separate crimes, he could plead guilty to one and receive the mandatory minimum sentence of ten years in prison. Meyer rejected that offer, and a jury subsequently found him guilty on all twenty-three counts. Instead of the ten years offered by the prosecutor, he received 230 years in prison—a decade for each image he had been found guilty of possessing.

Meyer's cumulative sentence spans several natural lifetimes, with no possibility of early release. His sentence is functionally equivalent to life without parole, which is "the second-harshest sentence available under [Supreme Court] precedents for any crime, and the most severe sanction available for a nonhomicide offense." *Graham v.*

Florida, 560 U.S. 48, 92 (2010) (Roberts, C.J., concurring in the judgment). Because the Supreme Court's holdings do not clearly establish that Meyer's sentence is grossly disproportionate to his act of possessing twenty-three images of child pornography, we must affirm the denial of habeas under AEDPA. But if a sentence like Meyer's were to come before the Supreme Court on direct review, I would hope that the Court would consider it one of the "exceedingly rare" non-capital sentences that violate the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 289-90 (1983)). Because the Arizona Supreme Court has already upheld a similar sentence in a precedential opinion, *State v. Berger*, 134 P.3d 378 (Ariz. 2006), and because our court will nearly always review such cases under AEDPA deference, the only court that is likely to be in a position to hold that a sentence like Meyer's is unconstitutional is the United States Supreme Court. I hope that future defendants sentenced under this framework will file petitions for certiorari to the Supreme Court on direct review, giving the Court the opportunity to evaluate the constitutionality of their sentences de novo.

I also encourage the Arizona Legislature to reconsider the sentencing laws that dictated Meyer's sentence. As Meyer has shown, Arizona punishes certain violent crimes against children less harshly than it punishes the possession of twenty-three images of child pornography. A person convicted of sexual assault or second-degree murder of a child between the ages of twelve and fourteen would receive a presumptive sentence of 20 years, *see* Ariz. Rev. Stat. § 13-705(D)—far less than Meyer's sentence of three lifetimes without the possibility of parole. And no other state punishes possession of child pornography this harshly. That is because nearly every

other state to have considered the issue either defines the criminal violation as the act of possession regardless of the number of images, or, if it defines the violation at the level of the image, either permits concurrent sentences or imposes a cap on the total sentence. To achieve conformity with other states, and to eliminate what seem like nonsensical disparities in Arizona sentences for crimes involving children, I urge the Arizona Legislature to amend its laws to allow sentences on multiple counts of possession to run concurrently. Such an amendment would permit a sentencing court to impose a sentence that is proportional to the crime in light of the particular circumstances.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

William Michael Meyer, Petitioner, vs. Attorney General of the State of Arizona, et al., Respondents.	No. CV-19-08112-PCT-JAT **ORDER**

Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus ("Petition"). The Magistrate Judge to whom this case was assigned has issued a Report and Recommendation ("R&R") recommending that the Petition be denied. (Doc. 19). Petitioner has filed objections to the R&R ("objections"). (Doc. 20). Respondents have replied to the objections. (Doc. 22). Thereafter, Petitioner filed a further reply which is not authorized by the rules. (Doc. 23).

I. Legal Standard

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that the district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in

original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1226 (D. Ariz. 2003) ("Following *Reyna-Tapia*, this Court concludes that de novo review of factual and legal issues is required if objections are made, 'but not otherwise.'"); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir. 2009) (the district court "must review de novo the portions of the [Magistrate Judge's] recommendations to which the parties object."). District courts are not required to conduct "any review at all… of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) ("the court shall make a de novo determination of those portions of the [report and recommendation] to which objection is made.").

The Petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is incarcerated based on a state conviction. With respect to any claims that Petitioner exhausted before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must deny the Petition on those claims unless "a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law" or was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). Further, this Court must presume the correctness of the state court's factual findings regarding a petitioner's claims. 28 U.S.C. § 2254(e)(1). Additionally, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

Petitioner's objections largely just repeat his original claim from the Petition (without a specific objection to the facts, law or conclusions of the R&R). Thus, the Court will

review the claims themselves or the objections de novo as appropriate.

2. Factual Background

The R&R recounted the factual and procedural background of this case. (Doc. 19 at 1-4). Neither party objected to this summary and the Court hereby accepts and adopts it. In very short summary, Petitioner was convicted by a jury of 23 counts of sexual exploitation of a minor and was sentenced to a 230-year term of imprisonment. (*Id.*).

3. Claims in the Petition

Petitioner raises eight claims for relief before this Court. The R&R correctly summarized the claims as follows,

> In Ground One, Petitioner alleges that his due process and equal protection rights were violated when the State was allowed to present expert testimony by a witness who was not trained to opine on the subject matter for which he presented. Petitioner argues that the State did not present an expert "specifically trained in identifying or evaluating whether or not images found on a computer would or would not be depictions of underage children." In Ground Two, Petitioner alleges that his due process and equal protection rights were violated when the jury was not instructed that it had to determine that the victims were, in fact, actual children as opposed to computer generated images. In Ground Three, Petitioner alleges that his due process and equal protection rights were violated when he was charged, convicted, and sentenced for 23 different counts when they should have been treated as a single offense. In Ground Four, Petitioner alleges that his Eighth and Fourteenth

> Amendment rights were violated when his sentences were run consecutive to each other. In Ground Five, Petitioner alleges ineffective assistance of counsel because counsel was suffering from cancer and undergoing chemotherapy treatment before and during Petitioner's trial. Petitioner states that counsel's medical condition caused his failure to "interview witnesses who had access to the computers in question" and "would have aided Petitioner to refute the allegations in their entirety." Petitioner also states that counsel failed to challenge the voluntariness of his interview statements based upon his mental condition. In Ground Six, Petitioner alleges that counsel was ineffective for failing to inform him of the risks of not accepting the plea agreement. In Ground Seven, Petitioner alleges ineffective assistance of counsel for not adequately investigating the terms of Petitioner's plea agreement in his previous Child Abuse case that allegedly precluded the State from prosecuting him for the child pornography offense. Petitioner also states that the trial court's refusal to remove counsel, based upon an alleged conflict of interest, subjected Petitioner to ineffective assistance. In Ground Eight, Petitioner alleges that his Rule 32 counsel was ineffective in his first PCR proceeding for failing to find any meritorious claims to allege. (Docs. 7, 1.)
>
> In their Answer, Respondents argue that Grounds One through Eight fail on the merits, and a subpart of Ground Seven is procedurally defaulted without an excuse for the default.

(Doc. 19 at 4-5) (emphasis added).

A. Ground One

As indicated above, Petitioner's Ground One turns on his argument that the State's expert was not qualified to give an opinion on whether the images found on

Petitioner's computer were underage children. Petitioner presented this claim to the state appellate court, and the R&R quotes the opinion of the appellate court on this issue. (Doc. 19 at 12-18). The R&R concluded that the state court's decision was not contrary to or an unreasonable application of clearly established federal law. (Doc. 19 at 18).

In his objections, Petitioner reargues his theory that the expert was not qualified, but fails to address the state court's decision, or explain how it was contrary to or an unreasonable application of clearly established federal law. (Doc. 20 at 4-6). Nor did Petitioner address the fact that the jurors saw the images and could determine for themselves the ages of the children (specifically, the children were so young determining they were minors would be within a juror's ordinary understanding). (Doc. 20 at 17; Doc. 22 at 2); (Doc. 19 at 17-18 (collecting cases that hold no expert testimony is required when the children are sufficiently young)).

The Court agrees with the R&R that the state court's decision was not contrary to or an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. Petitioner's objections do not impact this conclusion and are overruled.

B. Ground Two

As stated above, Petitioner's second claim turns on his argument the jury instructions did not require the State to prove that the images were of actual children. Petitioner presented this claim to the state court of appeals and the R&R quotes the relevant portion of the court's decision. (Doc. 19 at 18-21). The R&R concludes that the state court's decision was not contrary to or an unreasonable application of clearly established federal

law, nor an unreasonable determination of the facts. (Doc. 19 at 21). Specifically, both the state court of appeals and the R&R concluded that the jury instruction given in Petitioner's case adequately required the jury to find that the images were of actual children. (Doc. 19 at 18-21).

In his objections, Petitioner reargues that the law requires the images to be of actual children. (Doc. 20 at 6-8). However, Petitioner makes no argument why the particular jury instructions in his case were inadequate. (*Id.*).

The Court agrees with the R&R that the state court's decision was not contrary to or an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. Petitioner's objections do not impact this conclusion and are overruled.

C. Ground Three

As indicated above, ground three is based on Petitioner's argument that he could not be charged with 23 separate counts of child pornography because he believes that since he did a single download, it should be a single crime. (Doc. 20 at 8-9). In his Petition, Petitioner stated this violated his due process and equal protection rights and the double jeopardy clause. (Doc. 1 at 8). Although Petitioner mentions three constitutional provisions, his only argument is under the double jeopardy clause. (*Id.*).

Petitioner presented this claim to the state court. (Doc. 19 at 22). This Court agrees with the R&R that the state court's decision was not contrary to or an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. (*Id.* at 22-24). Petitioner's objections reiterating his mistaken

belief that a single download of images is a single crime regardless of how many images are in the download, does not change this Court's conclusion regarding the state court's decision which rejected this claim. Thus, the objections are overruled.

D. Ground Four

In ground four Petitioner argues that his 230-year sentence (10 years for each of his 23 counts, running consecutively) violates the Eighth Amendment's protection against cruel and unusual punishment; specifically, he claims that his sentence is not proportional to his crimes. (Doc. 20 at 9). Petitioner presented this argument to the state court, and the state court rejected it. (Doc. 19 at 24). The R&R concluded that the state court's decision was not contrary to nor an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. (Doc. 19 at 24-26).

In his objections, Petitioner reiterates his conclusion that the sentence is disproportional to his crimes. (Doc. 20 at 9). The Court agrees with the R&R that the state court's decision (applying *Berger*) was not contrary to nor an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. (Doc. 19 at 24-26). The objection is overruled.

E. Ground Five

Preliminarily, the Court notes that grounds five through eight allege various theories of ineffective assistance of counsel. The R&R recounts the law governing ineffective assistance of counsel claims; and neither party has objected to this summary of the governing law. (Doc. 19 at 26-27). Accordingly, the Court hereby accepts this portion of the R&R.

In ground five, Petitioner alleges three factual predicates underlying his ineffective assistance of counsel claim at it relates to his counsel's alleged cancer treatments. (Doc. 19 at 30). First, Petitioner argues generally that counsel's alleged cancer and cancer treatments caused him to be ineffective; in other words, being treated for cancer would make any counsel ineffective by the nature of the treatment. (*Id.*). Second, Petitioner argues that due to counsel's on-going treatments, counsel failed to challenge the admissibility of Petitioner's confession. (*Id.*). Third, Petitioner argues that counsel's cancer treatments caused counsel to not interview certain witnesses. (*Id.*).

First, as to Petitioner's general argument that having cancer and cancer treatments per se made counsel ineffective, the Court agrees with the R&R that this argument does not show ineffective assistance of counsel. (Doc. 19 at 30 ("Petitioner's mere generalizations, without more, are clearly insufficient.")). In his objections, Petitioner asserts, "Chemotherapy by its very nature changes the biology of a person, specifically, brain chemistry [] counsel did not render effective assistance…." (Doc. 20 at 11). There is no evidence in this record for this assertion. Moreover, in his objections, Petitioner has in no way shown counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Second, as the R&R recounts, Petitioner argues: "counsel was ineffective for failing to file a motion to suppress his confession due to Petitioner's mental condition – Ménière's disease." (Doc. 19 at 32). The R&R concludes that counsel was not ineffective because this argument would have been futile, and counsel is not ineffective for failing to advance futile arguments. (*Id*). Petitioner objects and argues that the trial court, which

viewed his videotape confession and found Petitioner to be lucid, "pre-supposes the Court had the Petitioner evaluated be mental health professionals." (Doc. 20 at 12). Nothing in the record or the case law supports Petitioner's objection in this regard.

Petitioner also objects that the trial court, rather than the jury, determined his confession was voluntary. (*Id.* at 13). However, while the trial court makes a preliminary determination of the voluntariness of a confession in Arizona, once the confession is admitted, the jury is instructed that they must disregard an involuntary confession. Ariz. Rev. Stat. § 13-3988. In Petitioner's trial, the jury was instructed, "You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily. A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence or coercion, or threats or by any direct or implied promise, however slight." (Doc. 14-1 at 63). Accordingly, the jury did in fact find Petitioner's confession to be voluntary and this objection is overruled.

Third, Petitioner argues his counsel was ineffective for not interviewing witnesses who Petitioner claims had access to his computer. Petitioner exhausted this claim in the state court in his post-conviction relief Petition. The state court post-conviction relief judge, who was also the trial judge, found, in additional to the other overwhelming evidence of Petitioner's guilt, "[i]f the defendant presented additional witnesses to confirm other people had access to his computer, the Court would find that such additional witnesses would not have overcome the strength of the defendant's videotaped confession, confessing he downloaded child pornography." (Doc. 19 at

32). In his objections, Petitioner alleges that 8 witnesses could have been interviewed, and Petitioner claims that such witnesses would have stated that they had access to his computer. (Doc. 20 at 12). This Court agrees with the R&R that any such testimony is speculative. (Doc. 19 at 31). Further, the Court finds that the state court's decision was not contrary to nor an unreasonable application of clearly established federal law. In other words, counsel was not ineffective because even if such evidence exists, counsel's failure to offer it did not prejudice Petitioner.

F. Ground Six

In ground six Petitioner argues his counsel was ineffective for not explaining to Petitioner the risks of not taking the offered plea agreement. Petitioner exhausted this claim in state court in his post-conviction relief petition. (Doc. 19 at 33). The R&R recounts extensively all the locations in the state court record where Petitioner was advised of the offered plea agreement, and the sentence he was facing after trial. (Doc. 19 at 33-37).

In his objections, Petitioner does not argue that any of this recounting of the law or the facts in the R&R is incorrect. Instead, Petitioner argues that he believed that his plea agreement in a prior case barred prosecution of Petitioner in any future cases and that counsel should have made this legal argument. (Doc. 20 at 15) (Petitioner appears to be conflating his ground six and ground seven into a single objection).

With respect to ground six, this Court agrees with the R&R that the state court's decision that Petitioner's counsel adequately advised him of the plea agreement, was not contrary to nor an unreasonable application of federal law, nor was it based on an unreasonable

determination of the facts. Accordingly, relief on this claim is denied.

G. Ground Seven

Ground seven has both an exhausted and unexhausted claim. Petitioner's claim that his counsel failed to investigate whether his prior plea agreement barred future prosecution is exhausted. (Doc. 19 at 37-39). Petitioner's claim that his trial counsel had a conflict of interest is unexhausted. (Doc. 19 at 10-12).

1. Prior Plea Agreement

Petitioner claims his prior plea agreement precluded prosecution for the images that underlie the conviction in this case. The prior plea agreement actually says the opposite:

> The following charges will be dismissed, or if not filed, will not be brought against the defendant: COUNTS 2-3: CHILD ABUSE BY DOMESTIC VIOLENCE, CLASS 4 FELONIES; COUNT 1: CHILD ABUSE BY DOMESTIC VIOLENCE, CLASS 4 FELONY, REDUCED AS ABOVE; THIS PLEA AGREEMENT DOES NOT RESOLVE ALL POSSIBLE CHARGES STEMMING FROM KINGMAN POLICE DEPARTMENT DR NO. 2010-010894. HOWEVER, IF THE STATE FILES FURTHER CHARGES, THE STATE WILL NOT USE THIS CASE AS A PRIOR CONVICTION.

(Doc. 19 at 38) (emphasis omitted).

In his objections, Petitioner appears to be arguing he would not have taken the plea agreement in the prior prosecution had he understood he could still be prosecuted for this case. (Doc. 20 at 15). The conviction in the prior case is governed by a plea agreement that is not

before this Court in this case; additionally, that plea did not impact the sentence in this case. Because this objection has no bearing on this case, it is overruled. Thus, the Court agrees with the R&R that the state court's decision that the prior plea agreement did not preclude prosecution in this case, and thus counsel was not ineffective for not making this argument, was not contrary to nor an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts. (See Doc. 19 at 39). Accordingly, relief on this claim is denied.

2. Conflict of Interest

In his post-conviction relief petition in state court, Petitioner argued that his counsel had a conflict of interest. (Doc. 19 at 10). The post-conviction relief court found that this claim was not properly presented on post-conviction relief because Petitioner could have raised the claim on direct appeal, but did not, therefore it was precluded. (*Id.*) The R&R determined that Arizona Rule of Criminal Procedure 32.2(a) constitutes an adequate and independent state ground for denying relief. (Id. at 10-11). The R&R further concluded that Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice to overcome this procedural default. (*Id.* at 11-12). Additionally, the R&R concludes that the *Martinez* exception to exhaustion does not apply in this case. (*Id.* at 11).

In his objections, Petitioner repeatedly makes a conclusory assertion that he exhausted and presented and pursued all his claims. (Doc. 20 at 2-4). However, Petitioner makes no particular argument as to how the R&R's analysis, concluding that this sub-part of ground seven was neither exhausted nor excused from exhaustion, is incorrect. The Court overrules this

generalized objection. The Court finds the conflict of interest sub-part of ground seven is unexhausted without excuse and, accordingly, denies relief on this claim.

H. Ground Eight

In ground eight, Petitioner alleges that his first post-conviction relief counsel was ineffective for not raising meritorious claims. (Doc. 19 at 39). Petitioner exhausted this claim in his second post-conviction relief petition. (*Id.*). The second post-conviction relief judge found first post-conviction relief counsel was not ineffective. (*Id.*).

The R&R recounts that legally, there is no right to post-conviction relief counsel; thus, whether such counsel was ineffective does not state a claim that is cognizable on habeas. (*Id.* at 39-40). In his objections, Petitioner states the following conclusion: "Where the legislature creates a rule or law that provides for counsel in post-conviction relief is [*sic*] governed, the 6th amendment attached." (Doc. 20 at 15). Petitioner cites nothing for this conclusion, and the Court finds the law in the R&R is correct. Accordingly, this objection is overruled and relief on this claim is denied. Moreover, even if the law were otherwise, this Court finds that the state court's decision (that first post-conviction relief counsel was not ineffective) was not contrary to nor an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts. Thus, relief is denied for this alternative reason.

4. Certificate of Appealability

The R&R recommend that this Court deny a Certificate of Appealability on all grounds except ground four. Petitioner does not object to this recommendation. (Doc. 20). The state also did not object to this recommendation. (Doc. 22). The Court, having reviewed

these claims de novo, accepts the recommendation that a certificate of appealability be denied on grounds 1-3 and 5-8.

A. Petitioner's Argument

As indicated above, the R&R recommends that this Court grant a certificate of appealability as to ground four. This Court has reviewed ground four de novo due to Petitioner's objection to the R&R. Accordingly, the Court will make an independent determination of whether a certificate of appealability is warranted in this case. The R&R does not state why it recommends a certificate of appealability be granted on ground four. (Doc. 19 at 26 n.6).

The totality of Petitioner's ground four as stated in his Petition is as follows:

> GROUND FOUR: Violation of the U.S. Constitutional Amendments 8 cruel and unusual punishment and the 14th as to equal protection and due process and protection of the law made applicable to the state by the Arizona Constitution.
>
> Supporting FACTS…: Petitioner after his conviction was scheduled by the trial court for sentencing proceedings. At the sentencing proceeding, the court imposed a term of 10 years for each of the 23 counts of dangerous crimes against children (DCAC). In the process of pronouncing each term, the Court did in addition state that each term would be consecutive to one another resulting in a cumulative prison sentence of 230 years. This term of incarceration was the result of Petitioner's possession of a group of digital images that has been downloaded and possessed, or created at the same time.

(Doc. 1 at 9)

This recounting of Petitioner's claim makes it difficult to determine the exact factual predicate of Petitioner's cruel and unusual punishment claim. It is possible to interpret the claim as arguing that a 10-year sentence for a single image is the claimed Eighth Amendment violation. It is possible to interpret the claim as arguing consecutive sentences that, when aggregated, result in a 230-year sentence is the claimed Eighth Amendment violation. Finally, it is possible to interpret the claim as arguing that consecutive sentences for what Petitioner interprets as a single act (namely a single download of multiple images) is the claimed Eighth Amendment violation.

The R&R concludes that a ten-year sentence for each count of possession of child pornography is not grossly disproportionate. (Doc. 19 at 26). Thus, the R&R appears to have addressed both ten-year sentence for any one count, and the 230-year cumulative sentence for all 23 counts, and found both to be have "no inference of gross disproportionality." (Doc. 19 at 26). The R&R then concluded that based on these findings, the state court's decision on proportionality was not contrary to or an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. (*Id.*).

In his objections, the totality of Petitioner's argument is:

> The Court has not fully grasped the full extent of the 8th and 14th Amendment violations which Petitioner was actively, prejudicially, and erroneously subjected to. 23 Counts run consecutively against this Petitioner is disproportionate on its face and substance. 230 years is a grossly disproportionate term to the crimes charged. [citations omitted]. A.R.S. §§ 13-3553 and 13-205 have subjected Petitioner to both 8th and 14th Amendment

> violations pursuant to the U.S. Constitution. There is contrary to the inference of gross disproportionality which would and does require inter-jurisdictional analysis and is based on clear [remainder of sentence/paragraph omitted from filing sent to the Court].

(Doc. 20 at 9).

B. Law on Proportionality

"The Eighth Amendment generally requires a punishment to be proportionate to the crime." *Reece v. Williams*, No. 220CV00960JADVCF, 2020 WL 3172994, at *3 (D. Nev. June 15, 2020) (citing *Solem v. Helm*, 463 U.S. 277, 285-86 (1983)). The Ninth Circuit Court of Appeals summarized the showing required for such a claim as follows:

> Supreme Court precedent has established "gross disproportionality" as the controlling principle in assessing a petitioner's Eighth Amendment claims. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). In non-capital cases, the court must first compare the gravity of the offense with the severity of the sentence to determine whether it is one of the "rare" cases which leads to an inference of gross disproportionality. *See Graham v. Florida*, 560 U.S. 48, 59-60 (2010). If the sentence gives rise to such an inference, the court next compares the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Id.* at 60. Therefore, in order for [Petitioner] to be entitled to relief, he must demonstrate that it was objectively unreasonable for the Court of Appeal to determine that this is not one of the rare cases which leads to an inference of gross disproportionality. *See id.*

Mezzles v. Katavich, 731 F. App'x 639, 642-43 (9th Cir.), *cert. denied*, 139 S. Ct. 325 (2018).

In the context of an individual sentence, the R&R recounted the law as follows:

> "In assessing the compliance of a non-capital sentence with the proportionality principle, [the Court] consider[s] 'objective factors'" such as "the severity of the penalty imposed and the gravity of the offense." *Taylor v. Lewis*, 460 F.3d 1093, 1098 (9th Cir. 2006). If the state has a "reasonable basis" for believing that the law "advance[s] the goals of [its] criminal justice system in any substantial way[,]" the court shall not "sit as a 'superlegislature' [and] second-guess [those] policy choices." *Ewing v. California*, 538 U.S. 10, 28 (2003).

(Doc. 19 at 24).

In the context of consecutive sentences, the court in *Reece* stated:

> The Supreme Court has held, however, that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare." [citing *Solem v. Helm*, 463 U.S. 277, 289-90 (1983) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980))]. "Reviewing courts… should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." [citing *Solem*, 463 U.S. at 289-90].
>
> [A] consecutive ten-years-to-life sentence imposed as a deadly weapon enhancement falls short of implicating Eighth Amendment concerns. [citing *United States v. Parker*, 241 F.3d 1114, 1117 (9th Cir.

> 2001) (holding that mandatory consecutive sentences imposed by statute do not violate the Eighth Amendment and that, "as long as the sentence imposed on a defendant does not exceed statutory limits, this court will not overturn it on Eighth Amendment grounds"); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense….")].

Reece, 2020 WL 3172994, at *3 & nn. 24-26.

As an example, the Supreme Court has held that a 25-year-to-life sentence for grand theft is not cruel and unusual punishment:

> Ewing has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior "strikes" were serious felonies including robbery and three residential burglaries. To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California "was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." *Rummel*, *supra*, at 284. Ewing's is not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S., at 1005 (KENNEDY, J., concurring in part and concurring in judgment).
>
> We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly

> disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.

Ewing v. California, 538 U.S. 11, 30-31 (2003) (alteration in original).

This Court has previously discussed at length whether a proportionality analysis is applicable to consecutive sentences as an "aggregated" sentence. *See Patsalis v. Shinn*, CV 18-8101-PCT-JAT, at 19-24 (D. Ariz. Aug. 19, 2020). This Court concluded that a proportionality analysis applies only to each individual sentence and not the aggregate sentence as a whole. *Id.* at 24.

As discussed above and to reiterate,

> A challenge to the proportionality of a sentence is analyzed using objective criteria, including: (1) the gravity of the offense and harshness of the penalty; (2) a comparison of sentences imposed on other criminals in the same jurisdiction; and (3) a comparison of sentences imposed for the same crime in other jurisdictions. *Solem* [*v. Helm*], 463 U.S. [277] at 290-92 [(1983)]. Where, however, it cannot be said as a threshold matter that the crime committed and the sentence imposed are grossly disproportionate, it is not appropriate for the court to engage in a comparative analysis of the sentence received by the defendant and the sentences received by other defendants in other cases. *See United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998).

Vines v. Kane, No. C 05-5316JSW(PR), 2009 WL 331435, at *9 (N.D. Cal. Feb. 11, 2009).

C. Certificate of Appealability Standard

A judge may issue a COA "only if the applicant has made a substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2). The standards for granting a COA are the same for petitions under § 2254 and § 2255. *See United States v. Martin*, 226 F.3d 1042, 1046 n.4 (9th Cir. 2000). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *see also id.* (describing the COA determination as deciding whether the issues presented are "adequate to deserve encouragement to proceed further" [quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)]). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

The Court may address either element of the two-pronged COA test to determine the appealability of a district court's procedural ruling in any order if disposing one element resolves the issue. *See id.* at 485 ("[e]ach component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments"). "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (internal quotations omitted).

D. Analysis

With respect to ground four, this Court concludes that jurists of reason would not find it debatable whether the state court's decision was contrary or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 350 (2003) (Scalia concurring) ("In applying the Court's COA standard to petitioner's case, we must ask whether petitioner has made a substantial showing of a *Batson* violation and also whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA.").

First, Petitioner has offered no law suggesting that an individual 10-year sentence for possession of an image of child pornography is disproportional under *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) and *Ewing v. California*, 538 U.S. 10, 28 (2003). See (Doc. 19 at 24-25). Thus, jurists of reason would not find it debatable that Petitioner's 10-year sentence per count was proportional and constitutional.

Second, there is no clearly established federal law regarding whether mandatory consecutive sentences should be viewed in the aggregate for purposes of a proportionality analysis. *See Patsalis v. Shinn*, CV 18-8101-PCT-JAT, at 19-24 (D. Ariz. Aug. 19, 2020).[5] Therefore, the state court's rejection of Petitioner's argument that his 230-year consecutive sentence was not proportional could not be contrary to clearly established federal law. Additionally, unlike petitioner Patsalis,

[5] In *Patsalis*, notwithstanding this Court's conclusions regarding proportionality and AEDPA deference, this Court granted a certificate of appealability because reasonable jurists could disagree about the impact of the Arizona court's failure to apply the *Davis* exception to the *Berger* rule on proportionality under state law. *Patsalis*, CV 18-8101-PCT-JAT, at 34 (D. Ariz. Aug. 19, 2020). No similar argument was preserved in this case.

Petitioner here does not argue that the state court declined to consider his proportionality analysis such that he should be entitled to de novo review in federal court. Finally, even if this Court were to consider this claim de novo, Petitioner has not attempted to meet the factors of *Solem* such that he could show that his sentence was not proportional.

Third, Petitioner's argument that he should not be sentenced separately for each image he possessed was raised as a double jeopardy argument and therefore will not be considered for a certificate of appealability as a proportionality argument. A certificate of appealability is denied for the reasons stated above as to Petitioner's double jeopardy claim.

Thus, regardless of Petitioner's factual predicate of his proportionality argument, jurists of reason would not find it debatable whether the state court's decision was contrary to clearly established federal law. Alternatively, even under a de novo review Petitioner's aggregate sentence claim, jurists of reason would not debate that Petitioner has failed to develop the record or show any entitlement to relief under *Solem*.

For these reasons, upon de novo review of the record regarding the entirety of Petitioner's proportionality claim, the Court will deny a certificate of appealability.

V. Conclusion

Based on the foregoing,

IT IS ORDERED that the R&R (Doc. 19) is accepted and adopted except as to the certificate of appealability on the proportionality claim; the objections (Doc. 20) are overruled; the Petition is denied and dismissed with

prejudice; a certificate of appealability is denied, and the Clerk of the Court shall enter judgment accordingly.

Dated this 10th day of February, 2021.

s/James A. Teilborg
James A. Teilborg
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

William Michael Meyer, Petitioner, vs. David Shinn, et al., Respondents.	No. CV-19-08112-PCT-JAT (MHB) **REPORT AND RECOMMENDATION**

TO THE HONORABLE JAMES A. TEILBORG, UNITED STATES DISTRICT COURT:

Petitioner William Michael Meyer, who is confined in the Arizona State Prison Complex-Eyman, has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Respondents filed an Answer and Petitioner filed a reply. (Docs. 14, 18.)

BACKGROUND

Petitioner was convicted in Mohave County Superior Court, case #S8015-CR201400555, of 23 counts of sexual exploitation of a minor and was sentenced to a 230-year term of imprisonment. (Doc. 7; Doc. 14, Exh. A at 76-80, 93-101; Exh. L at 10-14; Exh. P.)

The Arizona Court of Appeals described the facts of the case, as follows:

> ¶ 2 Police executed a search warrant at Meyer's residence in connection with an investigation of child

> pornography being shared on the internet through a peer-to-peer file-sharing program. Meyer was present and told police that a desktop computer seized pursuant to the warrant belonged to him. When interviewed later at the police station, Meyer admitted he had downloaded child pornography and that 15–20 images of child pornography were on his computer.
>
> ¶ 3 A detective certified in computer forensics examined Meyer's computer and found 23 images on the hard drive depicting juvenile females, in the detective's words, "displayed exploitively or in sexual conduct." At trial, the detective testified that, in his opinion, each of the 23 images portrayed a female under the age of 15 in a sexually exploitive position or manner.
>
> ¶ 4 The jury found Meyer guilty of 23 counts of sexual exploitation of a minor under 15 years of age, each a Class 2 felony and dangerous crime against children. The superior court sentenced Meyer to consecutive mitigated ten-year prison terms on each count, for a combined total of 230 years.

State v. Meyer, 2016 WL 3672255 (Ariz. Ct. App. July 7, 2016).

In his direct appeal, Petitioner argued: (1) the State offered insufficient evidence to prove that the children depicted in the images were under the age of 15; (2) the superior court erred by failing to instruct the jury that the children depicted in the images had to be "real" or "actual" children; (3) the superior court violated the double jeopardy clauses of the United States and Arizona Constitutions when it imposed consecutive sentences for each of the 23 counts of sexual exploitation because his possession of the 23 images was a single act, and therefore the sentences constituted multiple punishments for the

same offense; and (4) the combined length of his sentences is disproportionate to the offenses and therefore violates the constitutional prohibition against cruel and unusual punishment. *See id.*

The appellate court affirmed Petitioner's convictions and sentences on July 7, 2016. *See id.* The record reflects that Petitioner filed a petition for review in the Arizona Supreme Court on September 7, 2016. (Exh. U.) On March 14, 2017, the Arizona Supreme Court summarily denied review. (Exh. W.)

On March 22, 2017, Petitioner filed a Notice of Post-Conviction Relief (PCR). (Exh. X.) Thereafter, appointed counsel filed a notice of completion notifying the court that, after a review of the record, he could find no claims for relief to raise in PCR proceedings. (Exh. HH.) Petitioner was afforded the opportunity to file a pro per PCR petition and, eventually, did so (after filing multiple motions and miscellaneous documents) raising the following claims:

- "Claim #1 – Rule 32 process [is] unconstitutional" because of "the court's failure to [ensure] that [he] had all of the requested and required items to fully prepare and present his claims." (Exh. PP at 1-2.)
- "Claim #2 – Attorney Eric Beiningen was ineffective because he was suffering from chemo brain" which "is known to affect a person's ability to organize, remember, and articulate." (Exh. PP at 2-3.)
- "Claim #3 – Attorney Beiningen was ineffective for failing to interview any witnesses," whom Petitioner identified as Kyle Plumb, Julia Plumb, Jessica Meyer, Brenda Meyer, Tara Williams, Maria Robinson, Norm Taylor, and Peral Taylor. (Exh. PP at 3.) Petitioner further stated that: (1) the first five listed individuals

had access to the Compaq desktop on which the police found contraband images, (2) Kyle Plumb was "a previous offender of sex crimes," and (3) these witnesses "would have provided character testimony that [he] is not the type of person to view these types of images on purpose." (Exh. PP at 3.)

- "Claim #4 – Attorney Beiningen was ineffective for failing to investigate the effect of Ménière's disease." (Exh. PP at 4.) Petitioner argued that an expert would have informed counsel that "the determinative confession was not voluntary." (Exh. PP at 4.)
- "Claim #5 – Attorney Beiningen was ineffective for failing to fully inform [Petitioner] of the risks of continuing to trial and the benefits of accepting the plea agreement." (Exh. PP at 4.)
- "Claim #6 – Attorney Beiningen was ineffective for not investigating the previous plea agreement for child abuse." (Exh. PP at 5.)
- "Claim #7 – The failure to remove Attorney Beiningen as counsel violated [Petitioner's] right to conflict-free representation." (Exh. PP at 5.)

On March 7, 2018, the trial court denied Petitioner's PCR petition finding that Claim #7 was precluded and that none of Petitioner's remaining claims had merit. (Exh. TT.) On April 1, 2018, Petitioner filed a petition for review in the Arizona Court of Appeals raising the same claims he raised in his PCR petition. (Exh. VV.) On June 14, 2018, the Arizona Court of Appeals granted review, but denied relief. See State v. Meyer, 2018 WL 2979407 (Ariz. Ct. App. June 14, 2018).

On March 26, 2018, Petitioner filed another Notice of Post-Conviction Relief and filed a pro per PCR petition on July 9, 2018, arguing: (1) the trial court violated

Petitioner's right to counsel by not appointing him counsel during his successive PCR proceeding; and (2) counsel rendered ineffective assistance during Petitioner's first PCR proceeding. (Exhs. YY; AAA.)

On August 20, 2018, the trial court denied Petitioner's second PCR proceeding. (Exh. DDD.) On September 9, 2018, Petitioner filed a document with the Arizona Court of Appeals that the court construed as a petition for review, raising the same claims alleged in Petitioner's successive PCR petition. (Exh. FFF.) On December 27, 2018, the Arizona Court of Appeals granted review, but denied relief. See State v. Meyer, 2018 WL 6815157 (Ariz. Ct. App. December 27, 2018).

In his habeas petition, Petitioner raises eight grounds for relief. In Ground One, Petitioner alleges that his due process and equal protection rights were violated when the State was allowed to present expert testimony by a witness who was not trained to opine on the subject matter for which he presented. Petitioner argues that the State did not present an expert "specifically trained in identifying or evaluating whether or not images found on a computer would or would not be depictions of underage children." In Ground Two, Petitioner alleges that his due process and equal protection rights were violated when the jury was not instructed that it had to determine that the victims were, in fact, actual children as opposed to computer generated images. In Ground Three, Petitioner alleges that his due process and equal protection rights were violated when he was charged, convicted, and sentenced for 23 different counts when they should have been treated as a single offense. In Ground Four, Petitioner alleges that his Eighth and Fourteenth Amendment rights were violated when his sentences were run consecutive to each other. In Ground Five, Petitioner alleges ineffective assistance of counsel because counsel

was suffering from cancer and undergoing chemotherapy treatment before and during Petitioner's trial. Petitioner states that counsel's medical condition caused his failure to "interview witnesses who had access to the computers in question" and "would have aided Petitioner to refute the allegations in their entirety." Petitioner also states that counsel failed to challenge the voluntariness of his interview statements based upon his mental condition. In Ground Six, Petitioner alleges that counsel was ineffective for failing to inform him of the risks of not accepting the plea agreement. In Ground Seven, Petitioner alleges ineffective assistance of counsel for not adequately investigating the terms of Petitioner's plea agreement in his previous Child Abuse case that allegedly precluded the State from prosecuting him for the child pornography offense. Petitioner also states that the trial court's refusal to remove counsel, based upon an alleged conflict of interest, subjected Petitioner to ineffective assistance. In Ground Eight, Petitioner alleges that his Rule 32 counsel was ineffective in his first PCR proceeding for failing to find any meritorious claims to allege. (Docs. 7, 1.)

In their Answer, Respondents argue that Grounds One through Eight fail on the merits, and a subpart of Ground Seven is procedurally defaulted without an excuse for the default.

DISCUSSION

A. Standards of Review

1. Merits

Pursuant to the AEDPA[1], a federal court "shall not" grant habeas relief with respect to "any claim that was

[1] Antiterrorism and Effective Death Penalty Act of 1996.

adjudicated on the merits in State court proceedings" unless the state court decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). This standard is "difficult to meet." Harrington v. Richter, 562 U.S. 86, 102 (2011). It is also a "highly deferential standard for evaluating state court rulings, which demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (citation and internal quotation marks omitted). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court…." Robinson, 360 F.3d at 1055.

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 404-05. "A state court's decision can involve an 'unreasonable application' of Federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

2. Exhaustion and Procedural Default

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

Proper exhaustion requires a petitioner to have "fairly presented" to the state courts the exact federal claim he raises on habeas by describing the operative facts and federal legal theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.").

A "general appeal to a constitutional guarantee," such as due process, is insufficient to achieve fair presentation.

Shumway, 223 F.3d at 987 (quoting Gray v. Netherland, 518 U.S. 152, 163 (1996)); see Castillo v. McFadden, 399 F.3d 993, 1003 (9th Cir. 2005) ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory."). Similarly, a federal claim is not exhausted merely because its factual basis was presented to the state courts on state law grounds – a "mere similarity between a claim of state and federal error is insufficient to establish exhaustion." Shumway, 223 F.3d at 988 (quotations omitted); see Picard, 404 U.S. at 275-77.

Even when a claim's federal basis is "self-evident," or the claim would have been decided on the same considerations under state or federal law, a petitioner must still present the federal claim to the state courts explicitly, "either by citing federal law or the decisions of federal courts." Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000) (quotations omitted), amended by 247 F.3d 904 (9th Cir. 2001); see Baldwin v. Reese, 541 U.S. 27, 32 (2004) (claim not fairly presented when state court "must read beyond a petition or a brief… that does not alert it to the presence of a federal claim" to discover implicit federal claim).

Additionally, a federal habeas court generally may not review a claim if the state court's denial of relief rests upon an independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). The United States Supreme Court has explained:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and

> adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31. A petitioner who fails to follow a state's procedural requirements for presenting a valid claim deprives the state court of an opportunity to address the claim in much the same manner as a petitioner who fails to exhaust his state remedies. Thus, in order to prevent a petitioner from subverting the exhaustion requirement by failing to follow state procedures, a claim not presented to the state courts in a procedurally correct manner is deemed procedurally defaulted, and is generally barred from habeas relief. See id. at 731-32.

Claims may be procedurally barred from federal habeas review based upon a variety of factual circumstances. If a state court expressly applied a procedural bar when a petitioner attempted to raise the claim in state court, and that state procedural bar is both "independent"[2] and "adequate"[3] – review of the merits of the claim by a federal habeas court is ordinarily barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

Moreover, if a state court applies a procedural bar, but goes on to alternatively address the merits of the federal

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[2] A state procedural default rule is "independent" if it does not depend upon a federal constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

[3] A state procedural default rule is "adequate" if it is "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-53 (1982)).

claim, the claim is still barred from federal review. See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law…. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.") (citations omitted); Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003) ("A state court's application of a procedural rule is not undermined where, as here, the state court simultaneously rejects the merits of the claim.") (citing Harris, 489 U.S. at 264 n.10).

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002) ("[T]he procedural default rule barring consideration of a federal claim 'applies only when a state court has been presented with the federal claim,' but declined to reach the issue for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally barred.'") (quoting Harris, 489 U.S. at 263 n.9).

Specifically, in Arizona, claims not previously presented to the state courts via either direct appeal or collateral review are generally barred from federal review because an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive petition is permitted. See Ariz. R. Crim. P. 32.1(d)-(h), 32.2(a) (precluding claims not

raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior Rule 32 post-conviction proceedings. See, e.g., Stewart, 536 U.S. at 860 (determinations made under Arizona's procedural default rule are "independent" of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S. 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (9th Cir. 1998) (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); State v. Mata, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. See Reed v. Ross, 468 U.S. 1, 9 (1984). The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the "cause and prejudice" test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. "A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an

external impediment such as government interference or reasonable unavailability of a claim's factual basis." Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations and internal quotations omitted). Ignorance of the State's procedural rules or other forms of general inadvertence or lack of legal training and a petitioner's mental condition do not constitute legally cognizable "cause" for a petitioner's failure to fairly present his claim. Regarding the "miscarriage of justice," the Supreme Court has made clear that a fundamental miscarriage of justice exists when a Constitutional violation has resulted in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96. Additionally, pursuant to 28 U.S.C. § 2254(b)(2), the court may dismiss plainly meritless claims regardless of whether the claim was properly exhausted in state court. See Rhines v. Weber, 544 U.S. 269, 277 (2005) (holding that a stay is inappropriate in federal court to allow claims to be raised in state court if they are subject to dismissal under § 2254(b)(2) as "plainly meritless").

B. Subpart of Ground Seven

In a subpart of Ground Seven, Petitioner alleges that his trial counsel had a conflict of interest and argues that the trial court erred by refusing to remove counsel.

Petitioner presented this claim in "Claim #7" of his first pro per PCR petition. (Exh. PP.) The trial court denied Petitioner's claim specifically finding that Claim #7 was precluded. (Exh. TT.) The Court stated, "[t]he defendant's claim that the trial court denied the defendant's request to remove trial counsel is precluded pursuant to Rule 32.2(a)[] because this is an issue raisable on direct appeal; this issue was not raised on appeal and is, therefore, now precluded." (Exh. TT.) Petitioner raised the same claim in his petition for review to the Arizona

Court of Appeals, who granted review, but summarily denied relief. See Meyer, 2018 WL 2979407.

Arizona Rule of Criminal Procedure 32.2(a) constitutes an adequate and independent state ground for denying review. See, e.g., Simmons v. Schriro, 187 Fed. Appx. 753, 754 (9th Cir. 2006) (holding that Arizona's procedural rules are "clear" and "well-established"); Stewart v. Smith, 46 P.3d 1067, 1070 (Ariz. 2002) (explaining that for most trial error, the "State may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding" for preclusion under Rule 32.2(a)) (internal quotation omitted); Stewart, 536 U.S. at 860 (finding Rule 32.2(a) determinations independent of federal law); Ortiz, 149 F.3d at 932 (finding Rule 32.2(a) regularly followed and adequate). Accordingly, because the Arizona state court denied the subpart alleged in Ground Seven by invoking an adequate and independent state rule, the subpart is procedurally barred.

Although a procedural default may be overcome upon a showing of cause and prejudice or a fundamental miscarriage of justice, see Coleman, 501 U.S. at 750-51, Petitioner has not established that any exception to procedural default applies. In his Reply, Petitioner fails to raise any applicable argument addressing the procedural bar of this claim. And, moreover, Petitioner's status as an inmate, lack of legal knowledge and assistance, and limited legal resources do not establish cause to excuse the procedural bar. See Hughes v. Idaho State Bd. of Corr., 800 F.2d 905, 909 (9th Cir. 1986) (an illiterate pro se petitioner's lack of legal assistance did not amount to cause to excuse a procedural default); Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (petitioner's reliance upon jailhouse lawyers did not constitute cause). Furthermore, to the extent Petitioner argues that his

default is excused under Martinez v. Ryan, 566 U.S. 1 (2012), the Court is not persuaded.

In Martinez, the Supreme Court created a "narrow exception" to the principle that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." 566 U.S. at 9. The Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id.

"Cause" is established under Martinez when:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim]… be raised in an initial-review collateral review proceeding.

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (citing Martinez). The subpart of Ground Seven does not assert ineffective assistance of counsel. Therefore, Martinez does not apply.

Accordingly, Petitioner has not shown cause for his procedural default.

Petitioner has also not established a fundamental miscarriage of justice. A federal court may review the merits of a procedurally defaulted claim if the petitioner demonstrates that failure to consider the merits of that claim will result in a "fundamental miscarriage of justice." Schlup, 513 U.S. at 327. The standard for establishing a

Schlup procedural gateway claim is "demanding." House v. Bell, 547 U.S. 518, 538 (2006). The petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 316. Under Schlup, to overcome the procedural hurdle created by failing to properly present his claims to the state courts, a petitioner "must demonstrate that the constitutional violations he alleges ha[ve] probably resulted in the conviction of one who is actually innocent, such that a federal court's refusal to hear the defaulted claims would be a 'miscarriage of justice.'" House, 547 U.S. at 555-56 (quoting Schlup, 513 at 326, 327). To meet this standard, a petitioner must present "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Schlup, 513 U.S. at 324. The petitioner has the burden of demonstrating that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 327.

In both his habeas petition and reply, Petitioner addresses the merits of his claims, and although he alleges various constitutional deprivations, he fails to present "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" demonstrating that "no reasonable juror would have convicted him in light of the new evidence." Thus, Petitioner has failed to establish a sufficient showing of actual innocence to establish a miscarriage of justice, and Petitioner cannot excuse his procedural default on this basis.

Accordingly, the Court finds that the subpart of Ground Seven is procedurally defaulted and Petitioner has not established that any exception to procedural default applies.

C. Ground One

In Ground One, Petitioner alleges that his due process and equal protection rights were violated when the State was allowed to present expert testimony by a witness who was not trained to opine on the subject matter for which he presented. Petitioner argues that the State did not present an expert "specifically trained in identifying or evaluating whether or not images found on a computer would or would not be depictions of underage children."

Petitioner presented this claim on direct appeal. The appellate court rejected the claim finding, in pertinent part:

> ¶ 6 Meyer contends the State offered insufficient evidence to prove that the children depicted in the images were under the age of 15. We review the sufficiency of the evidence de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Our review, however, is limited to determining whether substantial evidence supports the verdicts. *State v. Scott*, 177 Ariz. 131, 138 (1993); *see also* Ariz. R. Crim. P. 20(a) (requiring superior court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). As relevant here, substantial evidence is evidence, viewed in the light most favorable to sustaining the verdict, from which a reasonable person could find the defendant guilty beyond a reasonable doubt. *State v. Roseberry*, 210 Ariz. 360, 368-69, ¶ 45 (2005).
>
> ¶ 7 The offense of sexual exploitation of a minor is a dangerous crime against children punishable pursuant to A.R.S. § 13-705 (2016) if the minor is under 15 years of age. A.R.S. § 13-3553(C) (2016). The State presented substantial evidence at trial from which the jury could determine beyond a

reasonable doubt that the children depicted in the 23 charged images were under the age of 15.

¶ 8 First, the detective who found the images on Meyer's computer testified that the children all were under the age of 15. Meyer challenges this testimony, arguing that the detective was not qualified to opine about the age of the children because he was not a medical expert. Because Meyer did not object to the detective's testimony at trial, our review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385 (1991).

¶ 9 Arizona Rule of Evidence 702(a) provides that a witness may testify in the form of opinion if "qualified as an expert by knowledge, skill, experience, training, or education" and the expert's knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue[.]" We liberally construe whether a witness is qualified as an expert. *State v. Delgado*, 232 Ariz. 182, 186, ¶ 12 (App. 2013). "If an expert meets the 'liberal minimum qualifications,' [his or her] level of expertise goes to credibility and weight, not admissibility." *Id.* (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997)); *see also State v. Davolt*, 207 Ariz. 191, 210, ¶ 70 (2004) ("The degree of qualification goes to the weight given the testimony, not its admissibility."). We review a superior court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Salazar-Mercado*, 234 Ariz. 590, 594, ¶ 13 (2014).

¶ 10 The superior court did not abuse its discretion. The detective described his training and experience in determining the age of females depicted in images of child pornography. *See State v. Murray*, 184 Ariz.

> 9, 29 (1995) (detective's experience sufficient to qualify him as expert under Rule 702). The superior court did not err, much less commit fundamental error, in allowing the testimony.
>
> ¶ 11 Second, in addition to the detective's testimony, the 23 images were entered in evidence. The jurors could view the images and form their own independent opinions about the ages of the girls in the images. *See United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir. 1994). "Although expert testimony may help to establish a child's age, ordinary people routinely draw upon their personal experiences to estimate others' ages based upon appearance." *State v. Marshall*, 197 Ariz. 496, 502-03, ¶ 21 (App. 2000). In *Marshall*, we held the superior court erred in precluding the defendant from arguing that the jury could determine based on the appearance of the victim whether the victim was over 15. *Id.* at 502-03, ¶¶ 21-22. The reverse is likewise true; drawing on their personal experiences, the jurors could find the children depicted in the images in this case were under the age of 15 based on their appearances in the images. *See United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001) (jurors may make their own conclusions about the age of children depicted in child pornography). On this record, substantial evidence exists from which the jurors could find that the children were under the age of 15.

Meyer, 2016 WL 3672255.

Under the Due Process Clause, a conviction must be based upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. See Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005), as amended, (citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)), cert. den., 546 U.S. 1137 (2006). A habeas petitioner "faces a heavy

burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Id. The United States Supreme Court has held that when evaluating a claim of insufficiency of evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." United States v. Lewis, 787 F.2d 1318, 1324, amended, 798 F.2d 1250 (9th Cir. 1986).

In light of enactment of the AEDPA, the federal court must "apply the standards of Jackson with an additional layer of deference." Allen, 408 F.3d at 1274 (citing 28 U.S.C. § 2254(d)). The federal court must be "mindful of 'the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review.'" Id. at 1275 (quoting Wright v. West, 505 U.S. 277, 296-97 (1992) (plurality opinion)).

The statute under which Petitioner stands convicted provides, in pertinent part:

> A. A person commits sexual exploitation of a minor by knowingly:
>
> * * *
>
> 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual or print medium in which minors are engaged in exploitive exhibition or other sexual conduct.

A.R.S. § 13-3553(A)(2) (2016). The statute further provides that the offense of sexual exploitation of a minor is a dangerous crime against children punishable pursuant to A.R.S. § 13-705 (2016) if the minor is under 15 years of age. See A.R.S. § 13-3553(C) (2016).

The Court finds that the evidence submitted at trial overwhelmingly supported the appellate court's decision that the jury could find that the children depicted in all 23 charged images were under 15 years of age.

At trial, the State presented testimony from Detective Todd Foster of the City of Kingman Police Department, who initially found the images on Petitioner's computer and gave uncontested testimony that, based on his training in computer forensics and extensive experience in identifying the characteristics and determining the ages of females depicted in images of child pornography, the girls in all 23 charged images were under 15 years of age.[4] (Exhs. K at 37-80; L at 7-21; O.)

The record also reflects that Petitioner made the following statements during the investigation and arrest:

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[4] Notably, to the extent Petitioner argues that Detective Foster was not trained to opine on the subject matter for which he presented, the Court provided the following instruction to jurors following the presentation of evidence:

> A witness qualified as an expert by education or experience may state opinions on matters in that witness' field of expertise, and may also state reasons for those opinions.
>
> Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness' qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

(Exh. A, Item 31.)

Petitioner stated that he used LimeWire to download child pornography (Exh. K at 22; Exh. L at 50, 54); Petitioner admitted that he recognized the name that ended in "Jr." as Carl David Hyman, Jr., who according to Detective Foster is known as the purveyor of child pornography on the Internet, and that child pornography was what he thought of whenever he saw an image file bearing this name (Exh. K at 23; Exh. L at 59, 78, 84, 88); Petitioner reported that the child pornography he viewed depicted images of teen and preteen girls, and estimated that their ages were eight-plus with one image that he estimated to be seven years old (Exh. K at 23; Exh. L at 50, 58-59, 77-78, 83); Petitioner estimated that he had saved "15 to 20" images of child pornography onto his computer and stated that he had clicked "30 to 40 times" on Jr.'s child pornography website, and that "45%" of the pornography he had viewed on his computer depicted children (Exh. K at 22; Exh. L at 50-51, 53, 77, 88); and, in describing how he knew the ages of the children depicted in the images, Petitioner described the small size and design of the body and lack of physical development (Exh. L at 78-79).

In addition, each of the 23 images was shown to the jury – depicting young, undeveloped girls, small in statute and body shape with the name "Carl David Hyman Jr.," appearing on the image file name of 18 images and, otherwise, graphic language identifying the subjects in the image file name as girls under the age of 15 in all 23 images. (Exh. K at 62-77; Exh. L at 59, 78, 84, 88; Exh. O.)

Petitioner, however, argues that the State did not present an expert "specifically trained in identifying or evaluating whether or not images found on a computer would or would not be depictions of underage children." The Court is not persuaded.

"There is no requirement that expert testimony be presented in child pornography cases to establish the age of children in the pictures." U.S. v. Riccardi, 258 F.Supp.2d 1212, 1218-19 (D. Kan. 2003) (quoting United States v. Nelson, 38 Fed.Appx. 386, 392 (9th Cir. 2002)); see also United States v. Riccardi, 405 F.3d 852, 870 (10th Cir. 2005) (stating that although some cases may require expert testimony on the question of age, "this judgment must be made on a case-by-case basis"); United States v. Katz, 178 F.3d 368, 373 (5th Cir. 1999) (stating that the need for expert testimony on the issue of age must be decided on a case by case basis and that "it is sometimes possible for the fact finder to decide the issue of age in a child pornography case without hearing any expert testimony"). Indeed, in many cases, the fact that the unidentified subject is a child will be obvious from appearance. "Expert testimony is unnecessary – and may even be properly excluded – if people "of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation." United States v. Dewitt, 943 F.3d 1092, 1096 (7th Cir. 2019) (quoting Salem v. U.S. Lines Co., 370 U.S. 31, 35 (1962)). If the matter is within the jurors' understanding, expert testimony is not specialized knowledge that will help the trier of fact. See id.

The Court finds that these concepts apply fully in child pornography cases where jurors are capable of drawing on their own perceptions to determine a subject's age because these types of assessments are "regularly made in everyday life." United States v. Batchu, 724 F.3d 1, 7-8 (1st Cir. 2013) (explaining that expert testimony was unnecessary because a "multiplicity of indicators" – such as the victim's gait, conversation with the defendant,

voice, and general demeanor – would indicate her age to a layperson); see also United States v. Haymond, 672 F.3d 948, 960 (10th Cir. 2012) (holding that expert testimony was unnecessary because the photographs were known child victims, but also explaining that jurors at times can determine age for themselves "particularly when the subjects [are] sufficiently young").

In similar circumstances, courts have found that "expert evidence is not required to prove the reality of children portrayed in pornographic images." United States v. Lacey, 569 F.3d 319, 324-25 (7th Cir. 2009). As the court stated in Batchu, the fact that experts are not required for the "more technical subject of whether a sexually explicit image depicts a real or computer-generated child," "suggests that we should similarly not require the government to provide an expert witness for an assessment [about a child's age, which is] frequently and routinely made in day-to-day experience." Batchu, 724 F.3d at 7-8.

The Court finds that the appellate court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts in light of the evidence presented. The Court will recommend that Petitioner's claim as alleged in Ground One be denied.

D. Ground Two

In Ground Two, Petitioner alleges that his due process and equal protection rights were violated when the jury was not instructed that it had to determine that the victims were, in fact, real or actual children as opposed to computer generated images.

Petitioner presented this claim on direct appeal. The appellate court rejected the claim finding, in pertinent part:

> ¶ 12 Meyer next argues the superior court erred by failing to instruct the jury that the children depicted in the images had to be "real" or "actual" children. Because Meyer neither requested such an instruction nor objected to its omission, he has forfeited any right to appellate relief except for fundamental error. Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving or failing to give any instruction… unless the party objects thereto before the jury retires to consider its verdict[.]"); *Henderson*, 210 Ariz. at 567, ¶ 19. Error is fundamental if a defendant shows "that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. at 568, ¶ 24.
>
> ¶ 13 "Where the law is adequately covered by instructions as a whole, no reversible error has occurred." *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35 (1998). "Where terms used in an instruction have no technical meaning peculiar to the law in the case but are used in their ordinary sense and commonly understood by those familiar with the English language, the court need not define these terms." *State v. Barnett*, 142 Ariz. 592, 594 (1984).
>
> ¶ 14 The superior court instructed the jury it had to find that Meyer knowingly possessed a visual depiction of "a minor" engaged in certain conduct. It further instructed the jury that a "minor" is "a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted or modified." *See* A.R.S. § 13-3551(6) (2016) (defining "minor"). "[D]escribing 'minor' in the past

tense, evidences a clear intent that the minor be an actual living human being in that it implies the subject has the ability to age, i.e., become older through the passage of time. Fictitious persons do not possess this quality." *State v. Hazlett*, 205 Ariz. 523, 527, ¶ 11 (App. 2003). By instructing the jury in this fashion about the definition of "minor," the superior court adequately instructed the jury that each image had to depict an actual person who was under the age of 18 at the time the depiction was created, adapted or modified.

¶ 15 Relying on *Hazlett*, Meyer further argues the superior court erred by instructing the jury that it could draw the inference "that the 'participant was a minor if the visual depiction or live act through its title, text or visual representation depicted the participant as a minor.'" In *Hazlett*, this court held A.R.S. § 13-3556 (2016), from which the language of the "draw the inference" instruction was taken, was unconstitutionally overbroad because it could allow a conviction even when "no actual child was a participant in the depiction[.]" *Id.* at 529 n.10, ¶ 17.

¶ 16 Because Meyer did not object to the instruction below, we again review solely for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19. Under this standard of review, a defendant must establish both fundamental error and actual prejudice. *Id.* at ¶ 20. "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Zaragoza*, 135 Ariz. 63, 66 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *accord State v. Gomez*, 211 Ariz. 494, 499, ¶ 20 (2005); *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 17 (1999). When a defendant argues a jury instruction constituted fundamental error, to establish the prejudice required for reversal, the defendant "must show that a reasonable, properly instructed jury could have

> reached a different result." *State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013) (quotation omitted). In evaluating prejudice, we consider "the parties' theories, the evidence received at trial and the parties' arguments to the jury." *Id.*
>
> ¶ 17 In this case, Meyer cannot show the instruction prejudiced him because no reasonable, properly instructed jury would have failed to determine that the charged images depicted actual minors. Although some of the images bore labels implying they depicted children, the images themselves clearly are of actual minors, not adults pretending to be minors. Indeed, on appeal, Meyer concedes the evidence is sufficient to show that each child was "pre-pubescent." Moreover, Meyer directs this court to nothing in the record to suggest that the children depicted in the images are computer-generated depictions of children (not real children) or that the images were otherwise deceptive as to the subjects' ages. Therefore, regardless whether the superior court erred in instructing the jury pursuant to A.R.S. § 13-3556, Meyer has not met his burden to establish resulting prejudice.

Meyer, 2016 WL 3672255.

To merit federal habeas relief when an allegedly erroneous jury instruction is given, or an instruction is omitted, a petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). Petitioner alleges that the jury instructions in this case were defective because the instructions did not specifically require the jury to find that the children depicted in the images had to be "real" or "actual" children as opposed to computer generated images.

Here, the Court finds that Petitioner fails to demonstrate that the jury instructions so infected the entire trial that his resulting conviction violates due process. See Estelle, 502 U.S. at 71-72.

The jury instructions at issue provided, in pertinent part:

> The crime of Sexual Exploitation of a Minor requires proof that the defendant knowingly possessed any visual depiction in which a minor was engaged in exploitative exhibition or sexual conduct….
>
> "Exploitative exhibition" means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.
>
> "Minor" means a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted, or modified.
>
> * * *
>
> If you find the defendant guilty of Sexual Exploitation of a Minor, you must determine whether the offense was a dangerous crime against a child. An offense is a dangerous crime against a child if the defendant's conduct was focused on, directed against, aimed at, or targeted a victim under the age of fifteen.

(Exh. A, Item 31.)

These instructions mirror A.R.S. § 13-3553(A)(2) and (C), the statutory provisions under which Petitioner was convicted. All of the elements required to sustain a conviction under the statute are present in the

instruction.[5] Further, the fact that the instruction specifically states, "'Minor' means a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted, or modified," and "[a]n offense is a dangerous crime against a child if the defendant's conduct was focused on, directed against, aimed at, or targeted a victim under the age of fifteen," is significant. No reasonable juror could have mistaken this instruction to encompass computer generated images that look like young children, or read the instruction to mean images of adults that merely look like they are under fifteen years old.

Lastly, Petitioner never presented any colorable claim suggesting that the images depicted fictitious or virtual children, and thus, the jurors were never in a position to mistakenly apply § 13-3553 to computer generated images of fictitious children. And, during its closing remarks, the State never suggested that any of the 23 charged images portrayed youthful-looking women posing as young girls, or that the subjects depicted therein were virtually-created children. Instead, the record reflects that the prosecutor consistently asserted that all charged images depicted actual girls who were younger than 15 years of age. (Exh. L at 82-84.)

Accordingly, the Court finds that the appellate court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. The Court will recommend that Petitioner's claim as alleged in Ground Two be denied.

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[5] Notably, Arizona's model jury instructions do not propose an instruction requiring a finding that the children depicted were "actual" children.

E. Ground Three

In Ground Three, Petitioner alleges that his due process and equal protection rights were violated when he was charged, convicted, and sentenced for 23 different counts when the counts should have been treated as a single offense.

Petitioner presented this claim on direct appeal. The appellate court rejected the claim finding, in pertinent part:

> ¶ 18 Meyer also argues that the superior court violated the double jeopardy clauses of the United States and Arizona Constitutions when it imposed consecutive sentences for each of the 23 counts of sexual exploitation because his possession of the 23 images was a single act, and therefore the sentences constituted multiple punishments for the same offense. *See Taylor v. Sherrill*, 169 Ariz. 335, 338 (1991) (double jeopardy clause prevents imposition of multiple punishments for same offense). Although Meyer did not raise this argument in the superior court, a double jeopardy violation constitutes fundamental error. *State v. Millanes*, 180 Ariz. 418, 421 (App. 1994). We review double jeopardy claims de novo. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18 (2004).
>
> ¶ 19 Meyer contends his possession of the 23 images of child pornography constitutes a single offense because the images were downloaded and accessed on one occasion. But Meyer was convicted under A.R.S. § 13-3553(A)(2) (2016) for "possessing… any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." Pursuant to A.R.S. § 13-3551(12), visual depiction "includes each visual image that is contained in [a]… photograph or data stored in any form and that is capable of conversion into a visual image." Under the

> statutes, therefore, "possession of each image of child pornography is a separate offense." *State v. Berger*, 212 Ariz. 473, 474, ¶ 3 (2006); *see also State v. Jensen*, 217 Ariz. 345, 348 n.5, ¶ 6 (App. 2008) (Possession of child pornography is "defined in terms of the visual image itself rather than any specific media or physical object containing the image."). Thus, regardless whether Meyer acquired the images simultaneously, his possession of each image constitutes a separate offense. *See State v. McPherson*, 228 Ariz. 557, 560, ¶ 7 (App. 2012). Accordingly, Meyer did not commit a single act for which the superior court subjected him to more than one punishment; rather, he committed 23 separate acts of possession of child pornography. Because Meyer was properly convicted of multiple counts of sexual exploitation of a minor, the superior court did not impose multiple punishments for a single offense in violation of the prohibition against double jeopardy.

Meyer, 2016 WL 3672255.

"The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal[;] [i]t protects against a second prosecution for the same offense after conviction[;] [a]nd it protects against multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977) (quotations and citations omitted). "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy – protection against cumulative punishments – is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." Ohio v. Johnson, 467 U.S. 493, 499 (1984). "Because the substantive power to prescribe crimes and determine punishments is vested with the legislature…, [t]he question under the Double Jeopardy Clause whether

punishments are 'multiple' is essentially one of legislative intent[.]" Id. at 499, 104 S.Ct. at 2541 (citations omitted).

As noted previously, A.R.S. § 13-3553(A)(2), provides that "[a] person commits sexual exploitation of a minor by knowingly:… [d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." Furthermore, "[s]exual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-705." A.R.S. § 13-3553(C). A "visual depiction" is defined to include "each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image." A.R.S. § 13-3551(12). Accordingly, the plain language of the statutes makes "the possession of each image of child pornography [] a separate offense." State v. Berger, 134 P.3d 378, 379 (Ariz. 2006).

Petitioner alleges that each of images had the same date and time stamp indicating that "one event took place." The Court finds that Petitioner's argument misses the mark. Petitioner possessed 23 separate and discrete images of child pornography and, as such, committed multiple violations of the same law. See A.R.S. §§ 13-3551(12) and 13-3553(A)(2).

Because Petitioner was properly convicted of 23 individual counts of possession of child pornography, the trial court did not impose multiple punishments for a single offense in violation of the Double Jeopardy Clause. Accordingly, the Court finds that the appellate court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. The Court

will recommend that Petitioner's claim as alleged in Ground Three be denied.

F. Ground Four

In Ground Four, Petitioner alleges that his Eighth and Fourteenth Amendment rights were violated when his sentences were run consecutive to each other.

Petitioner presented this claim on direct appeal. The appellate court rejected the claim finding, in pertinent part:

> ¶ 20 Finally, Meyer contends the combined length of his sentences is disproportionate to the offenses and therefore violates the constitutional prohibition against cruel and unusual punishment. *See* U.S. Const. amend. VIII. Meyer acknowledges our supreme court rejected this same argument in upholding sentences totaling 200 years in *Berger*, 212 Ariz. at 483, ¶ 51, but argues that *Berger* was wrongfully decided. As an intermediate appellate court, we are bound by the decisions of our supreme court and have no authority to disregard or overturn them. *Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013). Under *Berger*, Meyer's sentences do not violate the Eighth Amendment.

Meyer, 2016 WL 3672255.

The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted." U.S. Const. amend. VIII. "[B]arbaric punishments" and "sentences that are disproportionate to the crime" are cruel and unusual punishments. Solem v. Helm, 463 U.S. 277, 284 (1983). "Only extreme sentences that are 'grossly disproportionate' to the crime" are forbidden. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). "In assessing the compliance of a non-capital sentence with the

proportionality principle, [the Court] consider[s] 'objective factors'" such as "the severity of the penalty imposed and the gravity of the offense." Taylor v. Lewis, 460 F.3d 1093, 1098 (9th Cir. 2006). If the state has a "reasonable basis" for believing that the law "advance[s] the goals of [its] criminal justice system in any substantial way[,]" the court shall not "sit as a 'superlegislature' [and] second-guess [those] policy choices." Ewing v. California, 538 U.S. 10, 28 (2003).

Petitioner was sentenced to 10 years' imprisonment for each image of child pornography in his possession. The Arizona legislature has mandated consecutive sentences for dangerous crimes against children, including, possession of child pornography of which Petitioner was convicted. See A.R.S. §§ 13-3553 and 13-705. That mandate is within the prerogative of the legislature. See, Rummel v. Estelle, 445 U.S. 263, 274 (1980).

Furthermore, the "tradition of deferring to state legislatures in making and implementing such important policy decisions is long-standing." Ewing, 538 U.S. at 24-25 (2003). The Court finds that Petitioner's consecutive sentences are constitutional.

As to the proportionality of Petitioner's sentence, in Berger, the Arizona Supreme Court specifically addressed the legislative history leading to the enactment of the possession of child pornography law at issue in this case. See Berger, 134 P.3d at 382-83. The court emphasized that:

> Such legislation [] recognizes the fact that producers of child pornography exist due to the demand for such materials. "The consumers of child pornography therefore victimize the children depicted… by enabling and supporting the continued production of child pornography, which entails

> continuous direct abuse and victimization of child subjects."

Id. at 383 (quoting United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998)). The court further explained that the inclusion of the possession of child pornography among the crimes targeted for enhanced sentencing provides "lengthy periods of incarceration… intended to punish and deter" "those predators who pose a direct and continuing threat to the children of Arizona." Id. (quoting State v. Williams, 854 P.2d 131, 135 (Ariz. 1993)). The court also noted that in advancing the compelling interest of protecting children from sexual exploitation, the Supreme Court of the United States has stated:

> It is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'… The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.

Osborne v. Ohio, 495 U.S. 103, 109 (1990).

The Court, therefore, finds that the Arizona legislature had a "reasonable basis" for believing that a mandatory ten-year sentence for possession of child pornography "advance[s] the goals of [its] criminal justice system in a substantial way." Ewing, 538 U.S. at 28.

In considering the gravity of the offenses, Petitioner does not argue that his crime, a "dangerous crime against children," is not serious. Rather, Petitioner attempts to minimize his conduct by stating that his possession of multiple images was created at the same time. Petitioner, however, possessed 23 separate and discrete images of child pornography and, as such, committed multiple

violations of the same law. Moreover, "possession of child pornography is a serious crime punishable as a felony under federal law and most state laws," Berger, 134 P.3d at 383-84, and his actions directly oppose a compelling State interest – protecting children. As noted, the photographs of children exploited for sexual purposes continue to damage the children depicted. And, they may be used to lure more children into child pornography or molestation.

In light of the foregoing, the Court cannot conclude that a ten-year sentence for each count of possession of child pornography is grossly disproportionate. Petitioner's sentences are long, but as illustrated, they reflect a rational legislative intent, and are entitled to deference, that offenders who have committed serious or violent felonies against children must be incapacitated. See Ewing, 538 U.S. at 30.

Since the Court has found no inference of gross disproportionality, it need not undertake any intra- or inter-jurisdictional analyses. See Harmelin, 501 U.S. at 1005.

Accordingly, the Court finds that the appellate court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. The Court will recommend that Petitioner's claim as alleged in Ground Four be denied.[6]

G. Grounds Five through Eight

In Grounds Five through Eight, Petitioner alleges multiple grounds of ineffective assistance of counsel. To

[6] The Court will, however, recommend that a Certificate of Appealability be granted as to this issue.

establish a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient under prevailing professional standards, and that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). In order to establish deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness." Id. at 699. A petitioner's allegations and supporting evidence must withstand the court's "highly deferential" scrutiny of counsel's performance, and overcome the "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. A petitioner bears the burden of showing that counsel's assistance was "neither reasonable nor the result of sound trial strategy," Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001), and actions by counsel that "'might be considered sound trial strategy'" do not constitute ineffective assistance. Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

In order to establish prejudice, a petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id. Courts should not presume prejudice. See Jackson v. Calderon, 211 F.3d 1148, 1155 (9th Cir. 2000). Rather, a petitioner must affirmatively prove actual prejudice, and the possibility that a petitioner suffered prejudice is insufficient to establish Strickland's prejudice prong. See Cooper v. Calderon, 255 F.3d 1104, 1109 (9th Cir. 2001) ("[A petitioner] must 'affirmatively prove prejudice.'… This requires showing more than the possibility that he was prejudiced by counsel's errors; he must demonstrate that the errors actually prejudiced

him.") (quoting Strickland, 466 U.S. at 693). However, the court need not determine whether counsel's performance was deficient if the court can reject the claim of ineffectiveness based on the lack of prejudice. See Jackson, 211 F.3d at 1155 n.3 (the court may proceed directly to the prejudice prong).

1. Ground Five

In Ground Five, Petitioner alleges ineffective assistance of counsel because counsel was suffering from cancer and/or undergoing chemotherapy treatment before and during Petitioner's trial. Petitioner states that counsel's medical condition caused his failure to: (1) "interview witnesses who had access to the computers in question" and "would have aided Petitioner to refute the allegations in their entirety" and (2) challenge the voluntariness of Petitioner's interview statements based upon Petitioner's mental disorder. Petitioner presented the ineffective assistance claim he alleges in Ground Five in "Claim #2," "Claim #3," and "Claim #4" of his first PCR petition. In denying the claim, the trial court stated,

> CLAIM #2
>
> The defendant claims that trial counsel, Eric Beiningen, rendered ineffective assistance of counsel because he suffered "Chemo Brain." The defendant has failed to show that Mr. Beiningen's health issues, if any, affected or lessened his ability to effectively represent the defendant. The defendant's claim, at best, is conclusory. The defendant does not state any specific instance, or example, of defective representation based on any health issues. Assuming Mr. Beiningen was suffering from health issues during his representation of the defendant, the defendant does not show how this affected his representation. The Court presided over the defendant's trial and did not observe anything to

suggest that trial counsel's representation was affected by any health issues. Mr. Beiningen represented the defendant with competence, professionalism, and diligence, and the defendant's claim that any health issues suffered by trial counsel caused counsel to render ineffective assistance of counsel is without merit.

CLAIM #3

The defendant claims that trial counsel, Eric Beiningen, rendered ineffective assistance for failing to interview witnesses. Specifically, the defendant claims that Mr. Beiningen failed to interview Kyle Plumb, Julia Plumb, Jessica Meyer, Brenda Meyer, Tara Williams, Maria Robinson, Norm Taylor, and Peral Taylor. According to the defendant, the first five witnesses had access to the defendant's computer (the defendant testified at trial that other people had access to his computer) and Kyle Plumb is known as a sex crime offender. Further, the witnesses would offer character testimony that the defendant was not the type of person to view child pornography on purpose. Assuming Mr. Beiningen failed to interview any of these witnesses, the defendant has failed to show that there was a reasonable probability that the outcome of the case would have been any different. The evidence presented against the defendant at trial was overwhelming. The defendant admitted that the computer seized by law enforcement, which contained 23 images of child pornography, was his computer. The child pornography images were accessed the same day law enforcement seized the defendant's computer. The defendant confessed, on video, that he downloaded child pornography and 15-20 images of child pornography were on his computer. The defendant admitted to downloading images of mainly girls ages 8 and up. The defendant admitted that he is attracted to young girls and

described what it is about young girls that attracts him. The defendant testified that other people had access to his computer. If the defendant presented additional witnesses to confirm other people had access to his computer, the Court would find that such additional witnesses would not have overcome the strength of the defendant's videotaped confession, confessing he downloaded child pornography. Likewise, if the Court allowed character testimony that the defendant is not the type of person to knowingly download child pornography, and if the Court allowed testimony that Kyle Plumb is known as a sex crime offender, this testimony would not have overcome the strength of the evidence against the defendant. The evidence against the defendant was overwhelming, and the defendant has failed to show that the outcome would have been any different had trial counsel interviewed these witnesses and presented the above testimony. Therefore, the defendant has failed to state a colorable claim for relief.

CLAIM#4

The defendant claims that trial counsel, Eric Beiningen, rendered ineffective assistance because he failed to investigate the effects of Ménière's disease to show that his confession was not voluntary, and a voluntariness hearing should have been requested. The defendant testified at trial that he has Ménière's disease which causes him balance issues and causes him to pass out and faint. Although he did not specifically deny downloading and possessing child pornography during his trial testimony, regarding his videotaped confession, the defendant testified that he does not remember much of the interview because he was having "spells," which can affect what he says. The defendant further testified that because he cannot remember what he said during the videotaped interview, he denied making

the incriminating statements. He further testified that when he is having "spells," he says anything to "get out of there." He also claimed the interviewing officer was "badgering" him during the interview. The Court watched the defendant's videotaped interview twice during the trials, and the defendant's claim that his attorney was ineffective for not investigating the effects of Ménière's disease which rendered his confession involuntary is baseless and without any merit. Again, the Court has viewed the defendant's videotaped confession, and the Court would have never granted a motion to suppress because the defendant's confession was absolutely voluntary. As the defendant testified, Ménière's disease causes balance issues and can cause a person to become dizzy and to faint. It does not cause a person to have "spells" which causes the person to make random and incriminating statements. During the videotaped interview, the defendant never suffered a "spell." He never became dizzy, never lost his balance, and never fainted. The defendant was very lucid during the interview, in complete control of his thought processes and faculties, and answered all the questions in an appropriate manner. Further, the officer conducting the interview never "badgered" the defendant. The officer was very polite, non-threatening, and asked open-ended questions which allowed the defendant no restrictions on answering the officer's questions. The defendant's claim that trial counsel rendered ineffective assistance for not investigating Ménière's disease has no merit because the defendant's Ménière's disease clearly did not affect him during the interview nor cause him to confess to downloading and possessing child pornography. Accordingly, the defendant has failed to state a colorable claim for relief.

(Exh. TT at 6-9.) The Arizona Court of Appeals granted review, but summarily denied relief. See Meyer, 2018 WL 2979407.

The mere existence of a loosely described mental illness or condition cannot be assumed to affect legal proceedings unless the condition manifests itself in courtroom behavior. In order to assert a claim based on ineffective assistance due to illness, a defendant must point to specific errors or omissions in counsel's courtroom behavior and conduct at trial that were a product of the attorney's illness. See, e.g., Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000); Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987); United States v. Eyman, 313 F.3d 741, 743 (2d Cir. 2002). It is the magnitude of those errors that is determinative, and an attorney's admission of deficient performance is not dispositive. See Chandler v. United States, 218 F.3d 1305, 1316 n.16 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001); Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir. 1999).

Petitioner alleges general statements stating that counsel's cancer condition and treatment affected his "mood, perceptions and cognitive thinking process," and counsel was unable to properly prepare or muster an adequate defense due to his condition. Petitioner's mere generalizations, without more, are clearly insufficient.

Petitioner, however, attempts to link counsel's cancer condition and treatment with his alleged failure to interview witnesses and move to suppress Petitioner's confession due to Petitioner's mental condition – Ménière's disease.

In the context of an ineffective assistance of counsel claim based on a failure to investigate and interview witnesses, "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that

makes particular investigations unnecessary." Strickland, 466 U.S. at 691. He must "at a minimum conduct a reasonable investigation enabling him to make informed decisions about how to best represent his client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994); Cox v. Ayers, 613 F.3d 883, 893 (9th Cir. 2010). This includes a duty to follow up on exculpatory evidence. See Kimmelman v. Morrison, 477 U.S. 365, 384-85 (1986) (counsel deficient for failing to conduct any pretrial discovery); see also Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (defense counsel's duties include "a duty to investigate the defendant's 'most important defense,' and a duty adequately to investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict" (citations omitted)), amended by 253 F.3d 1150 (9th Cir. 2001).

However, "'the duty to investigate and prepare a defense is not limitless,' and… 'it does not necessarily require that every conceivable witness be interviewed or that counsel must pursue every path until it bears fruit or until all conceivable hope withers.'" Hamilton v. Ayers, 583 F.3d 1100, 1129 (9th Cir. 2009) (citation omitted); Stankewitz v. Woodford, 365 F.3d 706, 719 (9th Cir. 2004). "To determine the reasonableness of a decision not to investigate, the court must apply 'a heavy measure of deference to counsel's judgments.'" Babbitt v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998); Strickland, 466 U.S. at 691 ("a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments"). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. A disagreement with counsel's tactical decisions does not prove that the representation

was constitutionally deficient. See United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981).

Regarding counsel's failure to interview witnesses, the Court assumes Petitioner is referring to the names mentioned in his first PCR petition since he fails to mention any names in his habeas petition. Not only does Petitioner fail to mention any names, but he also fails to offer any documentation or affidavits elucidating the content of the witness' proposed testimony, or identify how said testimony would have been favorable to his defense. Without a specific, affirmative showing of what the missing evidence or testimony would have been, Petitioner's claims consist of nothing more than self-serving speculation, which is fatal to his claim.

Furthermore, even assuming counsel was deficient for his failure to investigate and interview witnesses, Petitioner cannot establish that there was a reasonable probability that the outcome of the case would have been any different. Indeed, as found by the trial court, the evidence was overwhelming – including – Petitioner's admission that the computer seized by law enforcement containing 23 images of child pornography was his computer, the child pornography images were accessed the same day that law enforcement seized Petitioner's computer, Petitioner's video confession that he downloaded child pornography and had 15-20 images of child pornography on his computer, and Petitioner's admission to being attracted to and downloading images of girls mainly ages eight and up. The PCR judge, who presided over the trial, even stated, "[i]f the defendant presented additional witnesses to confirm other people had access to his computer, the Court would find that such additional witnesses would not have overcome the strength of the defendant's videotaped confession, confessing he downloaded child pornography."

As to Petitioner's contention that counsel was ineffective for failing to file a motion to suppress his confession due to Petitioner's mental condition – Ménière's disease, this claim also fails because Petitioner cannot demonstrate that any such motion would have been granted. The presence of a mental illness or impairment is, not alone, sufficient to find that a waiver was not voluntary, knowing, and intelligent. See Martin v. Quinn, 472 Fed.Appx. 564, 567 (9th Cir. 2012) (rejecting ineffective assistance of counsel claim for failure to present evidence of the defendant's mental illness regarding the admissibility of the defendant's confession). In addition, all objective signs in the record indicate that Petitioner was lucid, coherent, and cooperative during the course of the interviews. Failure to raise an issue does not constitute ineffective assistance where the issue is untenable and has no merit. See Sexton v. Cozner, 679 F.3d 1150, 1157 (9th Cir. 2012) ("Counsel is not necessarily ineffective for failing to raise even a non-frivolous claim, so clearly we cannot hold counsel ineffective for failing to raise a claim that is meritless."). Further, Petitioner has not established that even with the evidence of mental impairment, his statements to the police would have necessarily been suppressed. Movant has not shown that, had counsel moved to suppress the statements on these grounds, the results of the proceedings against him would have been different.

Accordingly, the Court finds that the state court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. The Court will recommend that Petitioner's claim as alleged in Ground Five be denied.

2. Ground Six

In Ground Six, Petitioner alleges that counsel was ineffective for failing to inform him of the risks of not accepting the plea agreement.

Petitioner presented the ineffective assistance claim he alleges in Ground Six in "Claim #5" of his first PCR petition. In denying the claim, the trial court stated,

> Claim #5
>
> The defendant claims that trial counsel, Eric Beiningen, rendered ineffective assistance of counsel for failing to inform the defendant of the risks of trial and the benefits of accepting a plea. On June 11, 2014, Judge Carlisle advised the defendant, pursuant to *State v. Donald*, 198 Ariz. 418, 10 P.3d 1193 (App. 2000), that if convicted, he will be ordered to serve between 230 and 291 calendar years in prison. Judge Carlisle also advised the defendant that the State offered the defendant to plead guilty to only Count 1, Sexual Exploitation of a Child, and receive the minimum of 10 years in prison. The defendant rejected the State's plea offer. The defendant advised Judge Carlisle that he understood the range of sentencing if convicted and he understood the terms of the plea offer which he rejected. Further, in the defendant's July 30, 2014 written request for a new attorney, the defendant stated, "I said no to the plea deal." Clearly, the defendant was advised of the risks of trial, was advised of the terms of the State's plea offer, and rejected the plea offer and proceeded to trial. Therefore, there is no merit to the defendant's claim that trial counsel failed to properly advise him regarding the terms of the plea offer and the risks of trial.

(Exh. TT at 9-10.) The Arizona Court of Appeals granted review, but summarily denied relief. See Meyer, 2018 WL 2979407.

The two-part test under Strickland applies to ineffective assistance of counsel claims relating to the plea process. See Missouri v. Frye, 566 U.S. 133, 140-41 (2012); Lafler v. Cooper, 566 U.S. 156, 162-63 (2012); Hill v. Lockhart, 474 U.S. 52, 57 (1985). Generally, "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Frye, 566 U.S. at 145. "A defendant has the right to make a reasonably informed decision whether to accept a plea offer." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002) (citations omitted). As such, trial counsel must adequately inform the defendant, so that he has "the tools he needs to make an intelligent decision" regarding the plea. Id. at 881. While counsel must adequately inform the defendant, the question is not whether "counsel's advice [was] right or wrong, but… whether that advice was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970); see Turner, 281 F.3d at 880. Counsel's ineffectiveness results from "gross error," not a failure to "accurately predict what the jury or court might find." Turner, 281 F.3d at 881. Counsel is also not required to "discuss in detail the significance of a plea agreement," or "strongly recommend the acceptance or rejection of a plea offer." Id.

In order to show prejudice in the context of plea offers, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163. Where it is alleged that trial counsel's advice caused the defendant to reject the plea offer, "a defendant must show that but for the ineffective advice of

counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 164.

The Court having reviewed the record in this matter finds that Petitioner was adequately informed of the risks associated with not accepting the plea agreement. Specifically, at the June 11, 2014 Donald Hearing requested by Petitioner's counsel, the following exchange occurred:

> THE COURT: …All right. Mr. Meyer, you're charged in this case with 23 class 2 felonies, each of which is a dangerous crime against children in the first degree, is alleged to be a dangerous crime against children in the first degree. If you're found guilty, then for each of them, the range of sentence would be 10 to 24 years in prison.
>
> The presumptive sentence would be 17 years in prison. If you're convicted of any one of those, you would have to serve every day of the sentence imposed.
>
> If you're convicted of more than one sentence, the sentences would have to run consecutively or one after another. So if you were convicted, for instance, of all 23 counts, the minimum sentence that I could impose would be 230 years in prison. And you would have to serve every day of that sentence.
>
> So you won't be eligible to get out early at all. You would have to serve at least every day of that sentence.

The maximum sentence would be 552 years. So it would be somewhere between 230 and 552 years in prison.

And I actually didn't look. I'm assuming there aren't any enhancement allegations. Are there any enhancement allegations not included in the indictment, Mr. Camacho?

MR. CAMACHO: I have not filed any, no.

THE COURT: And I guess that the maximum sentence has also not yet been filed to add allegations of aggravating factors. Would there be any aggravating factors alleged?

MR. CAMACHO: It's unlikely that I will.

THE COURT: All right. So I misspoke. The maximum would be 17 times 23, 391 years. So it would be somewhere between 230 and 291 years. That's somewhat irrelevant, obviously. I think the 230 year sentence would be more than a life sentence in connection with this case.

Also, if you were convicted of any one of these offenses, you would have to register as a sex offender for the rest of your life. There will probably be a sex offender registration fee.

You could be ordered to pay a fine. You could be ordered to pay a fine of up [*sic*] $150,000 plus surcharges and assessments for each count. So that's almost three and a half million dollars in fines that you could be ordered to pay. You could be ordered to pay restitution.

I think that's probably everything I need to explain about the range of sentence if you're convicted at trial of the offenses that you're charged with. Mr. Camacho, is there anything else you feel I need to

explain about the range of sentence if the defendant was convicted at trial?

MR. CAMACHO: No, Your Honor.

THE COURT: Mr. Beiningen?

MR. BEININGEN: No, Your Honor.

THE COURT: All right. Is there a plea offer that's either on the table or was on the table at some point in time?

MR. CAMACHO: There was a plea offer that was on the table. I believe it's been rejected. It was to plead to Count 1 as it is charged and have a 10 year sentence.

THE COURT: All right. So Mr. Meyer, under the plea offer that was on the table but apparently has been rejected, you would plead guilty to one count of sexual exploitation of a minor. You would be sentenced to 10 years in prison, which is the mandatory minimum sentence.

You would have to serve every day of that sentence. It would be a dangerous crime against children in the first degree. You would still have to register as sex offender for the rest of your life. You could be ordered to pay a fine of up to $150,000 plus surcharges and assessments. You could be ordered to pay restitution.

There's not a lot else that I can do under that plea offer. And I would assume the remaining counts would be dismissed.

Anything else you want me to explain about the plea offer as far as the Donald Hearing goes, Mr. Camacho?

MR. CAMACHO: No, Your Honor.

THE COURT: Mr. Beiningen?

MR. BEININGEN: No, Your Honor.

(Exh. B. at 5-8.)

Furthermore, the trial court's statements at Petitioner's sentencing hearing convincingly demonstrate that Petitioner had been advised of the risks of proceeding to trial and that Petitioner elected not to plead guilty. The court stated:

> Mr. Meyer, in a way your case is somewhat sad. You're 31 years of age and you're now going to spend the rest of your life in prison, and it's kind of sad because that didn't have to happen.
>
> Number one, you didn't have to download 23 images of child pornography and keep them; number two, you didn't have to go to trial. You had other options not to put yourself in this position. I don't know exactly what the plea offers that were made to you were, but I have a pretty good idea, just based on my experience in these types of cases, and you rejected the offers, which was certainly your right, but you were also advised not only by myself, I believe, but also your attorneys, I'm sure on numerous occasions, this sentence I was going to have to impose if you went to trial and were convicted.
>
> And, Mr. Meyer, the evidence against you at trial was overwhelming, and you were in a very unique position because you had a chance of a free bite of the apple. You had trial number one before we had to declare a mistrial, so you knew what the evidence was against you, and it was overwhelming, and I don't know why you would insist on going to trial number two after you had a chance to see what the evidence was against you in this case, and it's overwhelming. It's certainly more than sufficient evidence to convict you of these charges, simply that the images were

> found on your computer because this was your computer, these images were accessed the day the police found them. There's really nobody else in your residence that would have accessed these images but you, so certainly the images found on your computer would have been more than sufficient to convict you of all 23 counts.
>
> But beyond that, you also confessed. You had the chance to see your confession two different times during your trials, and you freely and voluntarily without any coercion confessed to the police officer in this case, and your testimony that you were badgered by the officer was just not believable.
>
> The testimony that you had some sort of medical problem where you didn't really know what you were saying or you don't remember what you were saying, therefore you must not have said it, that simply was not credible either.
>
> You were talking to the officer very freely. He was simply asking you questions. He wasn't badgering you, he wasn't putting words in your mouth. He wanted you to talk because he was curious about why you did this and how you went about this, so you freely and voluntarily confessed and, again, why you put yourself in this position, I don't know. Again, it's kind of sad that you basically forced this and forced this upon your family, that you're now going to die in prison.

(Exh. P at 6-8.)

The record clearly establishes that Petitioner was fully advised regarding the terms of the plea offer; the differences between going to trial and accepting the plea offer, including, the penalty comparison if Petitioner went to trial and lost – versus if he pled guilty pursuant to the

plea offer; and the overwhelming evidence the State would necessarily present in this case.

Thus, based on review of the record, the Court cannot say that case law requires more of defense counsel in this instance, as Petitioner had clearly been advised of the risks of proceeding to trial and that Petitioner elected not to plead guilty, and Petitioner had the "tools" he needed "to make a reasonably informed decision whether to accept a plea offer." Turner, 281 F.3d at 880-81.

Accordingly, the Court finds that the state court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. The Court will recommend that Petitioner's claim as alleged in Ground Six be denied.

3. Ground Seven

In a subpart of Ground Seven, Petitioner alleges ineffective assistance of counsel for not adequately investigating the terms of Petitioner's previous plea agreement for Child Abuse that allegedly precluded the State from prosecuting him for the child pornography found on his computers.

Petitioner presented the ineffective assistance claim he alleges in Ground Seven in "Claim #6" of his first PCR petition. In denying the claim, the trial court stated,

> The defendant claims that trial counsel, Eric Beiningen, rendered ineffective assistance because he did not investigate the defendant's previous plea agreement for Child Abuse to determine if the previous plea agreement precluded any further prosecution. In Mohave County Superior Court CR-2010-0522, the defendant plead guilty, pursuant to a Stipulated Guilty Plea, to Child Abuse by Domestic

> Violence. The plea agreement contains the following language:
>
> THIS PLEA AGREEMENT DOES NOT RESOLVE ALL POSSIBLE CHARGES STEMMING FROM KINGMAN POLICE DEPARTMENT DR NO. 2010-010894.
>
> As included in the felony indictment, Kingman Police Department DR No. 2010-010894 is the investigative report involving the investigation of the defendant possessing child pornography which resulted in the defendant's conviction and sentence. Not only does the prior plea agreement not preclude any further prosecution, the plea agreement specifically allows further charges stemming from the specific investigation, Accordingly, there is no merit to the defendant's ineffective [assistance] of counsel claim.

(Exh. TT at 10-11.) The Arizona Court of Appeals granted review, but summarily denied relief. See Meyer, 2018 WL 2979407.

Petitioner's ineffective assistance of counsel claim has no merit as reflected in the plain terms of Petitioner's previous plea agreement. The plea agreement resolving Petitioner's Child Abuse charges in Mohave County Superior Court CR 2010-0522 stated, as follows:

> The following charges will be dismissed, or if not filed, will not be brought against the defendant: **COUNTS 2-3: CHILD ABUSE BY DOMESTIC VIOLENCE, CLASS 4 FELONIES; COUNT 1: CHILD ABUSE BY DOMESTIC VIOLENCE, CLASS 4 FELONY, REDUCED AS ABOVE; THIS PLEA AGREEMENT DOES NOT RESOLVE ALL POSSIBLE CHARGES STEMMING FROM KINGMAN POLICE DEPARTMENT DR NO. 2010-010894. HOWEVER, IF THE STATE FILES FURTHER**

> **CHARGES, THE STATE WILL NOT USE THIS CASE AS A PRIOR CONVICTION.**

(Exh. III at 2.) As noted in the state court's decision, "KINGMAN POLICE DEPARTMENT DR NO. 2010-010894," is the investigative report involving the investigation of Petitioner's possessing child pornography in the instant matter.

Furthermore, the record also contains the minute entry for the change-of-plea proceeding in Mohave County Superior Court CR 2010-0522, which states, "[t]he Court finds that the Defendant has read the plea agreement, and it has been explained to the Defendant by defense counsel; the Defendant understands the plea agreement, and it contains everything agreed to between the parties." (Exh. JJJ.)

Finding that Petitioner's ineffective assistance claim as alleged in Ground Seven is clearly meritless, and finding that the state court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts, the Court will recommend that Petitioner's claim as alleged in Ground Seven be denied.

4. Ground Eight

In Ground Eight, Petitioner alleges that his Rule 32 counsel was ineffective in his first PCR proceeding for failing to find any meritorious claims to allege.

Petitioner presented the ineffective assistance claim he alleges in Ground Eight in his second PCR petition. In denying the claim, the trial court stated,

> On August 18, 2017, appointed counsel, John William Lovell, filed a Notice of Completion advising that he has reviewed the entire record and is unable to find a

> meritorious issue of law or fact which may be raised as a basis for relief pursuant to Rule 32. The defendant has failed to state any specific instance of ineffective assistance of counsel. The defendant alleges that Mr. Lovell's avowal that he found no meritorious claim rendered his representation ineffective. Because the defendant did file a pro per Petition for Post-Conviction Relief raising several issues, the defendant claims Mr. Lovell was ineffective for not doing so. The Court reminds the defendant that the Court denied each and every claim raised by the defendant as having no merit and the Arizona Court of Appeals, Division One, denied relief. The defendant has presented no colorable claim of ineffective assistance of counsel by post-conviction relief counsel.

(Exh. DDD at 3.) The Arizona Court of Appeals granted review, but summarily denied relief. See Meyer, 2018 WL 6815157.

Not only is Petitioner['s] conclusory allegation insufficient, see, e.g., Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) (conclusory allegations of ineffective assistance do not warrant relief) and James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (same), but the state prisoner habeas statute provides: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

Moreover, there is generally no constitutional right to counsel in state post-conviction proceedings. See Coleman, 501 U.S. at 752 (citing Pennsylvania v. Finley, 481 U.S. 551 (1987)). But see Pacheco v. Ryan, 2016 WL 7423410 (D. Ariz. Sept. 23, 2016), report and recommendation adopted, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016) (recognizing constitutional right to counsel

in of-right PCR proceedings for pleading Arizona defendants). Where there is no right to counsel, there can be no deprivation of effective assistance of counsel. See Wainwright v. Torna, 455 U.S. 586, 587-88 (1982); see also Moorman v. Schriro, 426 F.3d 1044, 1058 (9th Cir. 2005), cert. denied, 548 U.S. 927 (2006) ("because there is no Sixth Amendment right to counsel in state postconviction proceedings, there can be no independent constitutional violation as a result of postconviction counsel's incompetence"); Martinez, 566 U.S. 1 (Supreme Court expressly declined to decide whether a freestanding right to counsel existed in state post-conviction proceedings offering a first chance to challenge ineffective assistance of trial counsel).

Consequently, Petitioner's claim of ineffective assistance of counsel during his first PCR proceeding does not state a cognizable claim for federal habeas relief. The Court will recommend that Ground Eight be denied.

CONCLUSION

Having determined that Grounds One through Eight fail on the merits, and a subpart of Ground Seven is procedurally defaulted without an excuse for the default, the Court will recommend that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**;

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed in forma pauperis on appeal be **GRANTED** as to Petitioner's Eighth Amendment cruel and unusual punishment claim

only; and that a Certificate of Appealability and leave to proceed in forma pauperis on appeal be **DENIED** as to Petitioner's remaining claims because Petitioner has not made a substantial showing of the denial of a constitutional right and because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 26th day of June, 2020.

s/Michelle H. Burns
Honorable Michelle H. Burns
United States Magistrate Judge.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM MICHAEL MEYER, Petitioner - Appellant, vs. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents - Appellees, and CHARLES L. RYAN, Respondent.	No. 21-15374 D.C. No. 3:19-cv-08112-JAT District of Arizona, Prescott ORDER (filed October 27, 2022)

Before: GRABER, FRIEDLAND, and SUNG, Circuit Judges.

Judge Friedland and Judge Sung have voted to deny the petition for rehearing en banc, and Judge Graber so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX E

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(C),
THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED
ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

WILLIAM MICHAEL MEYER, *Appellant.*

No. 1 CA-CR 15-0290
FILED 7-7-2016

Appeal from the Superior Court in Mohave County
No. S8015CR201400555
The Honorable Billy K. Sipe, Judge, *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Robert A. Walsh
Counsel for Appellee

Mohave County Legal Advocate, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Andrew W. Gould and Judge Randall M. Howe joined.

J O H N S E N, Judge:

¶1 William Michael Meyer appeals his convictions and resulting sentences on 23 counts of sexual exploitation of a minor. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Police executed a search warrant at Meyer's residence in connection with an investigation of child pornography being shared on the internet through a peer-to-peer file-sharing program. Meyer was present and told police that a desktop computer seized pursuant to the warrant belonged to him. When interviewed later at the police station, Meyer admitted he had downloaded child pornography and that 15-20 images of child pornography were on his computer.

¶3 A detective certified in computer forensics examined Meyer's computer and found 23 images on the hard drive depicting juvenile females, in the detective's words, "displayed exploitively or in sexual conduct." At trial, the detective testified that, in his opinion, each of the 23 images portrayed a female under the age of 15 in a sexually exploitive position or manner.

¶4 The jury found Meyer guilty of 23 counts of sexual exploitation of a minor under 15 years of age, each a Class 2 felony and dangerous crime against children. The superior court sentenced Meyer to consecutive mitigated ten-year prison terms on each count, for a combined total of 230 years.

¶5 Meyer timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2016), 13-4031 (2016), and -4033(A)(1) (2016).[1]

DISCUSSION

A. Sufficiency of Evidence.

¶6 Meyer contends the State offered insufficient evidence to prove that the children depicted in the images were under the age of 15. We review the sufficiency of the evidence de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Our review, however, is limited to determining whether substantial evidence supports the verdicts. *State v. Scott*, 177 Ariz. 131, 138 (1993); *see also* Ariz. R. Crim. P. 20(a) (requiring superior court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). As relevant here, substantial evidence is evidence, viewed in the light most favorable to sustaining the verdict, from which a reasonable person could find the defendant guilty beyond a reasonable doubt. *State v. Roseberry*, 210 Ariz. 360, 368-69, ¶ 45 (2005).

¶7 The offense of sexual exploitation of a minor is a dangerous crime against children punishable pursuant to

[1] Absent material revision after the relevant date of an alleged offense, we cite a statute's current version.

A.R.S. § 13-705 (2016) if the minor is under 15 years of age. A.R.S. § 13-3553(C) (2016). The State presented substantial evidence at trial from which the jury could determine beyond a reasonable doubt that the children depicted in the 23 charged images were under the age of 15.

¶8 First, the detective who found the images on Meyer's computer testified that the children all were under the age of 15. Meyer challenges this testimony, arguing that the detective was not qualified to opine about the age of the children because he was not a medical expert. Because Meyer did not object to the detective's testimony at trial, our review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385 (1991).

¶9 Arizona Rule of Evidence 702(a) provides that a witness may testify in the form of opinion if "qualified as an expert by knowledge, skill, experience, training, or education" and the expert's knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue[.]" We liberally construe whether a witness is qualified as an expert. *State v. Delgado*, 232 Ariz. 182, 186, ¶ 12 (App. 2013). "If an expert meets the 'liberal minimum qualifications,' [his or her] level of expertise goes to credibility and weight, not admissibility." *Id.* (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997)); *see also State v. Davolt*, 207 Ariz. 191, 210, ¶ 70 (2004) ("The degree of qualification goes to the weight given the testimony, not its admissibility."). We review a superior court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Salazar-Mercado*, 234 Ariz. 590, 594, ¶ 13 (2014).

¶10 The superior court did not abuse its discretion. The detective described his training and experience in determining the age of females depicted in images of child pornography. *See State v. Murray*, 184 Ariz. 9, 29 (1995) (detective's experience sufficient to qualify him as expert under Rule 702). The superior court did not err, much less commit fundamental error, in allowing the testimony.

¶11 Second, in addition to the detective's testimony, the 23 images were entered in evidence. The jurors could view the images and form their own independent opinions about the ages of the girls in the images. *See United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir. 1994). "Although expert testimony may help to establish a child's age, ordinary people routinely draw upon their personal experiences to estimate others' ages based upon appearance." *State v. Marshall*, 197 Ariz. 496, 502-03, ¶ 21 (App. 2000). In *Marshall*, we held the superior court erred in precluding the defendant from arguing that the jury could determine based on the appearance of the victim whether the victim was over 15. *Id.* at 502-03, ¶¶ 21-22. The reverse is likewise true; drawing on their personal experiences, the jurors could find the children depicted in the images in this case were under the age of 15 based on their appearances in the images. *See United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001) (jurors may make their own conclusions about the age of children depicted in child pornography). On this record, substantial evidence exists from which the jurors could find that the children were under the age of 15.

B. Jury Instructions.

¶12 Meyer next argues the superior court erred by failing to instruct the jury that the children depicted in the images had to be "real" or "actual" children. Because Meyer neither requested such an instruction nor objected

to its omission, he has forfeited any right to appellate relief except for fundamental error. Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving or failing to give any instruction… unless the party objects thereto before the jury retires to consider its verdict[.]"); *Henderson*, 210 Ariz. at 567, ¶ 19. Error is fundamental if a defendant shows "that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. at 568, ¶ 24.

¶13 "Where the law is adequately covered by instructions as a whole, no reversible error has occurred." *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35 (1998). "Where terms used in an instruction have no technical meaning peculiar to the law in the case but are used in their ordinary sense and commonly understood by those familiar with the English language, the court need not define these terms." *State v. Barnett*, 142 Ariz. 592, 594 (1984).

¶14 The superior court instructed the jury it had to find that Meyer knowingly possessed a visual depiction of "a minor" engaged in certain conduct. It further instructed the jury that a "minor" is "a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted or modified." *See* A.R.S. § 13–3551(6) (2016) (defining "minor"). "[D]escribing 'minor' in the past tense, evidences a clear intent that the minor be an actual living human being in that it implies the subject has the ability to age, i.e., become older through the passage of time. Fictitious persons do not possess this quality." *State v. Hazlett*, 205 Ariz. 523, 527, ¶ 11 (App. 2003). By instructing the jury in this fashion about the definition of "minor," the superior court adequately instructed the jury that each image had to depict an actual

person who was under the age of 18 at the time the depiction was created, adapted or modified.

¶15 Relying on *Hazlett*, Meyer further argues the superior court erred by instructing the jury that it could draw the inference "that the 'participant was a minor if the visual depiction or live act through its title, text or visual representation depicted the participant as a minor.'" In *Hazlett*, this court held A.R.S. § 13-3556 (2016), from which the language of the "draw the inference" instruction was taken, was unconstitutionally overbroad because it could allow a conviction even when "no actual child was a participant in the depiction[.]" *Id.* at 529 n.10, ¶ 17.

¶16 Because Meyer did not object to the instruction below, we again review solely for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19. Under this standard of review, a defendant must establish both fundamental error and actual prejudice. *Id.* at ¶ 20. "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Zaragoza*, 135 Ariz. 63, 66 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *accord State v. Gomez*, 211 Ariz. 494, 499, ¶ 20 (2005); *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 17 (1999). When a defendant argues a jury instruction constituted fundamental error, to establish the prejudice required for reversal, the defendant "must show that a reasonable, properly instructed jury could have reached a different result." *State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013) (quotation omitted). In evaluating prejudice, we consider "the parties' theories, the evidence received at trial and the parties' arguments to the jury." *Id.*

¶17 In this case, Meyer cannot show the instruction prejudiced him because no reasonable, properly

instructed jury would have failed to determine that the charged images depicted actual minors. Although some of the images bore labels implying they depicted children, the images themselves clearly are of actual minors, not adults pretending to be minors. Indeed, on appeal, Meyer concedes the evidence is sufficient to show that each child was "pre-pubescent." Moreover, Meyer directs this court to nothing in the record to suggest that the children depicted in the images are computer-generated depictions of children (not real children) or that the images were otherwise deceptive as to the subjects' ages. Therefore, regardless whether the superior court erred in instructing the jury pursuant to A.R.S. § 13-3556, Meyer has not met his burden to establish resulting prejudice.

C. Double Jeopardy.

¶18 Meyer also argues that the superior court violated the double jeopardy clauses of the United States and Arizona Constitutions when it imposed consecutive sentences for each of the 23 counts of sexual exploitation because his possession of the 23 images was a single act, and therefore the sentences constituted multiple punishments for the same offense. *See Taylor v. Sherrill*, 169 Ariz. 335, 338 (1991) (double jeopardy clause prevents imposition of multiple punishments for same offense). Although Meyer did not raise this argument in the superior court, a double jeopardy violation constitutes fundamental error. *State v. Millanes*, 180 Ariz. 418, 421 (App. 1994). We review double jeopardy claims de novo. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18 (2004).

¶19 Meyer contends his possession of the 23 images of child pornography constitutes a single offense because the images were downloaded and accessed on one occasion. But Meyer was convicted under A.R.S. § 13-3553(A)(2) (2016) for "possessing… any visual depiction in which a

minor is engaged in exploitive exhibition or other sexual conduct." Pursuant to A.R.S. § 13-3551(12), visual depiction "includes each visual image that is contained in [a]… photograph or data stored in any form and that is capable of conversion into a visual image." Under the statutes, therefore, "possession of each image of child pornography is a separate offense." *State v. Berger*, 212 Ariz. 473, 474, ¶ 3 (2006); *see also State v. Jensen*, 217 Ariz. 345, 348 n.5, ¶ 6 (App. 2008) (Possession of child pornography is "defined in terms of the visual image itself rather than any specific media or physical object containing the image."). Thus, regardless whether Meyer acquired the images simultaneously, his possession of each image constitutes a separate offense. *See State v. McPherson*, 228 Ariz. 557, 560, ¶ 7 (App. 2012). Accordingly, Meyer did not commit a single act for which the superior court subjected him to more than one punishment; rather, he committed 23 separate acts of possession of child pornography. Because Meyer was properly convicted of multiple counts of sexual exploitation of a minor, the superior court did not impose multiple punishments for a single offense in violation of the prohibition against double jeopardy.

D. Cruel and Unusual Punishment.

¶20 Finally, Meyer contends the combined length of his sentences is disproportionate to the offenses and therefore violates the constitutional prohibition against cruel and unusual punishment. *See* U.S. Const. amend. VIII. Meyer acknowledges our supreme court rejected this same argument in upholding sentences totaling 200 years in *Berger*, 212 Ariz. at 483, ¶ 51, but argues that *Berger* was wrongfully decided. As an intermediate appellate court, we are bound by the decisions of our supreme court and have no authority to disregard or

overturn them. *Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013). Under *Berger*, Meyer's sentences do not violate the Eighth Amendment.

CONCLUSION

¶21 For the foregoing reasons, we affirm Meyer's convictions and sentences.