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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDDIE BERNARD MCCOOL,)	No. CV 07-300-PHX-SRB (CRP)
Petitioner,)	
vs.)	REPORT AND
)	RECOMMENDATION
DORA B. SCHRIRO, et al.,)	
Respondents.)	

Eddie McCool (“Petitioner”), presently an inmate at the Arizona State Prison Complex in Buckeye, Arizona, filed a Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254 on February 9, 2007. (Doc 1). Petitioner challenges his state court conviction, alleging three grounds of error including ineffective assistance of trial counsel, due process violations and cruel and unusual punishment.

The Government contests the Petition arguing Petitioner’s claims are procedurally barred. This Court has reviewed the Petition, the Government’s Response and the record. (Docs 1, 14). It is the recommendation of this Court that the District Judge, after her independent review, dismiss the Petition. Petitioner’s claims are procedurally defaulted.

1 **I. FACTUAL AND PROCEDURAL HISTORY**

2 **A. Petitioner's Criminal Trial**

3 On April 1, 2004, a jury convicted Petitioner of two counts, attempted
4 aggravated assault and aggravated assault. (Doc 14, Ex A, p 3). The two counts
5 derived from an incident in April 2003 when Petitioner was observed swerving his car
6 through traffic, driving up onto a sidewalk, striking a pedestrian and pinning him
7 against a wall. (Doc 14, Ex H, pp 3-4). At trial it was shown Petitioner's blood
8 alcohol content on the day of the accident was 0.207, more than two and a half times
9 above the limit at which people are considered impaired for the purpose of driving.
10 (Doc 14, Ex H, p 5).

11 After striking the pedestrian, Petitioner exited his vehicle, briefly observed the
12 pedestrian and then got back into his car and attempted to drive through a nearby
13 alley. (Doc 14, Ex H, p 4). The alley was a dead end and Petitioner was trapped.
14 (Doc 14, Ex H, p 4). Petitioner again exited his vehicle. (Doc 14, Ex H, p 4). A
15 group of people who witnessed the accident had followed Petitioner's car into the
16 alley and tried to prevent him from leaving. (Doc 14, Ex H, p 4). As the group tried
17 to prevent Petitioner from leaving the scene, Petitioner began brandishing a knife.
18 (Doc 14, Ex H, p 4). A firefighter who arrived on the scene observed Petitioner
19 holding the knife in "an attack posture" and lunging at the group of people. (Doc 14,
20 Ex H, p 4). The firefighter approached Petitioner and told him to drop the knife.
21 (Doc 14, Ex H, p 4). Eventually, the firefighter backed Petitioner into a fence and
22 Petitioner was subdued by a police officer. (Doc 14, Ex H, p 4).

23 For striking the pedestrian, Petitioner was convicted of the aggravated assault
24 and received five years imprisonment. Petitioner was convicted of the attempted
25 aggravated assault for brandishing the knife against the firefighter; he received a
26 concurrent four year prison term for that offense. (Doc 14, Ex B). The trial judge
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1 mitigated both of Petitioner's counts because of his age, poor health, absence of a past
2 criminal record and lack of serious injury to the victims. (Doc 14, Ex H, p 5; Ex M).

3 **B. Petitioner's Direct Appeal**

4 After his sentencing, Petitioner's counsel filed an *Anders* brief, avowing that
5 she found no arguable question of law that is not frivolous. (Doc 14, Ex D); *see*
6 *Anders v. California*, 386 U.S. 738 (1967). Counsel also filed a motion to allow
7 Petitioner to file a supplemental brief pro per. (Doc 14, Ex E). Petitioner filed his
8 supplemental brief and subsequently an amended supplement brief. (Doc 14, Exs F,
9 I). Both briefs, as with most of Petitioner's filings, are somewhat incomprehensible.¹

10 In his briefs, Petitioner made the following allegations:

- 11 1. Multiple ineffective assistance of counsel claims;
- 12 2. Improper admission of the blood alcohol content test results because
13 the State failed to prove chain of custody; and
- 14 3. Eighth Amendment violation: error in calculating pre-sentence
15 incarceration credit for not crediting Petitioner for days prior to trial
16 when he was released on bond;

17 (Doc 14, Exs F, I).

18 In March 2005, the Arizona Court of Appeals denied Petitioner's appeal and
19 affirmed his conviction. (Doc 14, Ex H). The appellate court did not reach the merits
20 of Petitioner's ineffective assistance of counsel claims, finding that those claims must
21 be brought under Arizona Rule of Criminal Procedure 32.

22
23 ¹ For example, Petitioner's first issue presented in his Supplemental Brief to
24 the Arizona Court of Appeals reads as follows: "[w]here is it inescapable that the
25 Appellant sought to invoke the substance of his SIXTH AMENDMENT RIGHT; to
26 have compulsory process under the Confrontational Clause, and to have the
27 Assistance of Counsel for his self-defense claim? The asserted FOURTEENTH
28 AMENDMENT RIGHT to due process must be more evident than it is here, because
a jury must be able to identify with a defendant in order for a fair trial." (Doc 14, Ex
F, p 3).

1 The Court also found no error in the trial court’s admission of testimony
2 regarding the blood vials’ chain of custody. Even though the prosecution failed to
3 disclose to the defense handwritten notes that proved chain of custody and the trial
4 judge properly excluded those notes, the prosecution presented testimony showing the
5 continuity of possession.

6 Finally, the appellate court denied Petitioner’s allegation that his pre-sentence
7 incarceration credit was not correct. The appellate court pointed out Petitioner was
8 arguing he should receive pre-sentence credit for the time he was released on bond,
9 which is incorrect. After the appellate court denied his claims, Petitioner did not file
10 a petition for review with the Arizona Supreme Court.

11 **C. Petitioner’s Collateral Appeal**

12 In October 2005, Petitioner filed his post-conviction relief appeal (“PCR
13 Appeal”). (Doc 14, Ex L). In his PCR Appeal, Petitioner alleged multiple claims
14 including:

- 15 1. Violation of Sixth Amendment right to impartial jury;
- 16 2. Failure of trial judge to allow Petitioner to file for commutation,
17 which judge previously agreed he would permit;
- 18 3. Violation of Sixth Amendment right to effective counsel because (a)
19 trial counsel deprived Petitioner of alleged evidence to prove Petitioner
20 was not at scene of crime including “D.N.A. [sic] evidence or any other
21 evidence to match the pictures of the skid marks used as evidence
22 against the Petitioner”; (b) trial counsel failed to obtain evidence of his
23 prior criminal history; (c) Petitioner also asserted that his counsel was
24 somehow ineffective because Petitioner “could not appreciate the
25 wrongfulness of his accused act do [sic] to his state of mind of thinking
26 that he needed to protect himself from the angry group of mexican’s
27 [sic].” (Doc 14, Ex L);
- 28 4. Newly discovered evidence, which in fact was present at the time of trial;
5. State’s witnesses committed perjury, although Petitioner does not allege
 specific witnesses nor specific parts of testimony;
6. Eighth Amendment violation because Petitioner’s sentence was improperly
 aggravated with a prior felony conviction.

(Doc 14, Ex L, pp 4-5).

1 The Arizona Court of Appeals denied review and Petitioner did not appeal to
2 the Arizona Supreme Court. (Doc 14, Ex O).

3 **D. Petitioner’s Federal Appeal**

4 Petitioner timely filed a federal habeas petition on February 9, 2007. (Doc 1).
5 In his Habeas Petition, Petitioner asserts three grounds for relief. Those grounds are:

6 1. Sixth Amendment violations: (a) Ineffective assistance of trial
7 counsel for failing to raise a question of mens rea because Petitioner
8 was retreating from the firefighter, even though he was brandishing his
knife; (b) ineffective assistance of trial counsel for failing to “establish
Petitioner in altered state of consciousness”;

9 2. Fourteenth Amendment violation: Arizona’s A.R.S. §§ 13-1203 and
10 13-1204 are void for vagueness and Petitioner denied “due process
11 where similar application to white men are extremely different see DUI
statistics also the loose application to men of color by state
prosecutors”; and

12 3. Eighth Amendment violation: “Petitioner’s first felony offense, 62
13 yrs of age, with drinking problem was sentenced to prison with health
14 problems D.O.C. is not able to properly manage. Discrimination in
penalty application is cruel and unusual. Where Priest who hide [sic]
child molesting priest kills a man and receives probation.”

15 (Doc 1).

16 **II. ANALYSIS**

17 **A. Timeliness**

18 The Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”)
19 imposes a one-year statute of limitations for state prisoners filing federal habeas
20 petitions. 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run from the
21 latest of: (1) the date on which the judgment became final by the conclusion of direct
22 review or the expiration of the time for seeking such review; (2) the date on which the
23 impediment to filing an application created by State action in violation of the
24 Constitution or laws of the United States is removed, if the applicant was prevented
25 from filing by such State action; (3) the date on which the constitutional right asserted
26 was initially recognized by the Supreme Court, if the right has been newly recognized
27 by the Supreme Court and made retroactively applicable to cases on collateral review;

1 or (4) the date on which the factual predicate of the claim or claims presented could
2 have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

3 The Government does not allege the Petition is untimely and it does not appear
4 to be untimely. Petitioner's petition for review of his collateral appeal was denied by
5 the Arizona Court of Appeals on November 14, 2006. At that time Petitioner had
6 thirty days to file a petition for review with the Arizona Supreme Court. *See Ariz. R.*
7 *Crim. P. 31.19(a)*. The day after his right to file a petition expired, December 15,
8 2006, the AEDPA's statute of limitations was triggered. Petitioner's right to file a
9 federal habeas petition would not have expired until December 15, 2007. Petitioner
10 filed his federal habeas petition on February 9, 2007. Petitioner's Habeas Petition is
11 timely.

12 **B. Exhaustion and Procedural Default**

13 Pursuant to 28 U.S.C. § 2254(b)(1), before a federal court may consider a state
14 prisoner's application for a writ of habeas corpus, the prisoner must have exhausted
15 available state-court remedies. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). A
16 state prisoner in a federal habeas action must exhaust his claims in the state courts "by
17 invoking one complete round of the State's established appellate review process"
18 before he may submit those claims in a federal habeas petition. *O'Sullivan v.*
19 *Boerckel*, 526 U.S. 838, 845 (1999). In Arizona, it is sufficient for a state prisoner to
20 fairly present his claims to the Arizona Court of Appeals; he does not have to appeal
21 those claims to the Arizona Supreme Court. *Swoopes v. Sublett*, 196 F.3d 1008, 1010
22 (9th Cir.1999). Exhaustion of state remedies is required in order to give the "State the
23 opportunity to pass upon and correct alleged violations of its prisoners' federal
24 rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal citations omitted).

25 A petitioner must make the federal basis of a claim explicit either by citing
26 specific provisions of federal law or federal case law, even if the federal basis of a
27 claim is "self-evident." *Gatlin v. Madding*, 189 F.3d 888 (9th Cir.1999). "[I]t is not
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1 enough to make a general appeal to a constitutional guarantee as broad as due process
2 to present the ‘substance’ of such a claim to a state court.” *Gray v. Netherland*, 518
3 U.S. 152, 163 (1996) (internal citations omitted).

4 In the case before this Court, Petitioner asserts three grounds for relief. In
5 Ground I, Petitioner asserts a violation of his Sixth Amendment rights due to
6 ineffective assistance of counsel because his counsel (1) failed to show that he lacked
7 mens rea to commit the attempted assault on the firefighter because he was retreating,
8 and (2) failed to show that he was in an altered state of consciousness. While
9 Petitioner raised, somewhat incomprehensibly, ineffective assistance of counsel
10 claims in state court he did not raise the two claims he now brings in his federal
11 habeas petition.

12 In state court on direct appeal, Petitioner vaguely made multiple ineffective
13 assistance of counsel claims. The Court of Appeals did not rule on the merits of these
14 claims. Rather, the appellate court correctly found that these claims were
15 inappropriately raised. Ineffective assistance of counsel claims must be brought under
16 Arizona Rule of Criminal Procedure 32 during a collateral appeal. (Doc. 14, Ex. H).

17 In his PCR appeal, Petitioner raised some ineffective assistance of counsel
18 claims, but not the claims he now brings to this Court. In his briefing to the trial
19 court, Petitioner did raise a mens rea-like argument when he stated that his counsel
20 was somehow ineffective because Petitioner “could not appreciate the wrongfulness
21 of his accused act do [sic] to his state of mind of thinking that he needed to protect
22 himself from the angry group of mexican’s [sic].” (Doc. 14, Ex. L). However,
23 Petitioner did not argue how or what his counsel should have done differently
24 regarding Petitioner’s state of mind. The argument is even further confused by the
25 fact that Petitioner raised it in the context of allegations that he was never at the crime
26 scene at all and that his counsel was ineffective for failing to present DNA evidence
27 that would show that he was not there. This argument does not make sense as
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1 multiple witnesses identified Petitioner at the scene and DNA evidence was never an
2 issue at trial. In denying his ineffective assistance of counsel claims, the trial court
3 pointed out the severe insufficiencies in Petitioner’s arguments. It stated “defendant
4 merely states legal principles or conclusions and presents nothing more than
5 speculation as to what would have happened if counsel had done a better job.” (Doc
6 14, Ex M, p 2).

7 Further problematic for Petitioner, in appealing the trial court’s denial of his
8 PCR appeal, Petitioner brought new claims of ineffective assistance of counsel rather
9 than exhaust the claims he originally took to the trial court. At the trial court,
10 Petitioner argued his counsel was ineffective for failing to show he lacked mens rea
11 because he was scared and retreating from the firefighter. To the appellate court,
12 Petitioner changed his argument and asserted he lacked mens rea because he was in
13 an “altered state of consciousness.” Appearing to make a voluntary intoxication
14 argument, Petitioner seems to assert he was so intoxicated that his action were not
15 voluntary. Petitioner does not state how or what his attorney should have done
16 differently regarding this argument and Petitioner makes this argument for the first
17 time in front of the appellate court.

18 Petitioner did not exhaust the ineffective assistance of counsel claims that he
19 now brings in his habeas petition. The claims of ineffective counsel that Petitioner
20 asserted to the state courts lacked clarity and Petitioner presented different claims to
21 the trial court and appellate court. This lack of clarity and consistency of Petitioner’s
22 claims of ineffective assistance of counsel at each stage of the appellate process
23 deprived the state court of an adequate “opportunity to pass upon and correct alleged
24 violations of [the] prisoners’ federal rights.” *Baldwin*, 541 U.S. at 29. Because
25 Petitioner’s claims under Ground I were not raised at each level of the state’s
26 appellate review process, they are not exhausted.

1 In Ground II, Petitioner asserts a violation of his Fourteenth Amendment rights
2 because Arizona's A.R.S. §§ 13-1203 and 13-1204 are void for vagueness, and the
3 statutes are applied differently to white men than to men of color. Neither the
4 Petitioner's void for vagueness argument, nor the argument that the statutes are
5 applied inconsistently to different races are exhausted. Nowhere in Petitioner's direct
6 appeal or his PCR Appeal does Petitioner mention 'void for vagueness', draw into
7 question the validity of the two statutes cited in this ground of his habeas petition, or
8 suggest the statutes are applied differently based on race. Petitioner's claims in
9 Ground II are also not exhausted.

10 In Ground III, Petitioner asserts that his Eighth Amendment rights were
11 violated because his sentence amounted to cruel and unusual punishment. While
12 Petitioner argued Eighth Amendment violations in his state appeals, those are not the
13 same violations he now alleges in his federal petition.

14 In state court on direct appeal, Petitioner argued that his Eighth Amendment
15 rights were violated because there was an error in calculating his pre-sentence
16 incarceration credit. (Doc 14, Ex I). Later, in his PCR appeal, he argued that his
17 Eighth Amendment rights were violated because his sentence was improperly
18 aggravated by a prior felony conviction. (Doc 14, Ex L, pp 4-5). In his federal habeas
19 petition, Petitioner now argues that his sentence is cruel and unusual because the trial
20 judge did not take into account mitigating factors, such as his age and health issues.
21 Petitioner also asserts his sentence is unfair because a "molesting priest kills a man
22 and receives probation." (Doc. 1). These Eighth Amendment claims are not
23 exhausted. Furthermore, the trial judge did take into account Petitioner's age, health
24 and other factors and mitigated Petitioner's sentence.

25 If a petitioner has procedurally defaulted a claim in state court, a federal court
26 will not review the claim unless the petitioner shows "cause and prejudice" for the
27 failure to present the constitutional issue to the state court, or makes a colorable
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1 showing of actual innocence. *See Gray*, 518 U.S. at 162. Petitioner fails to show
2 cause or prejudice for the default or a fundamental miscarriage of justice. *Teague v.*
3 *Lane*, 489 U.S. 288, 298 (9th Cir.1989). When a petitioner's claims are procedurally
4 barred and the petitioner has not shown cause or prejudice for the default, "the district
5 court dismisses the petition because the petitioner has no further recourse in state
6 court." *Franklin*, 290 F.3d at 1231 (internal citations omitted). Therefore, this Court
7 recommends the federal habeas petition be dismissed because Petitioner's claims are
8 procedurally defaulted.

9 **III. RECOMMENDATION**

10 Based on the foregoing, the Magistrate Judge recommends that the District
11 Court, after its independent review and analysis, enter an order DISMISSING the
12 Petition for Writ of Habeas Corpus.

13 Pursuant to 28 U.S.C. § 636(b), any party may serve and file written objections
14 within ten days of being served with a copy of the Report and Recommendation. If
15 objections are not timely filed, they may be deemed waived. The parties are advised
16 that any objections filed are to be identified with the following case number: cv-07-
17 300-SRB.

18 The Clerk is directed to mail a copy of the Report and Recommendation to
19 Petitioner and counsel for Respondents.

20 DATED this 21st day of September, 2009.

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22 
23 **CHARLES R. PYLE**
24 **UNITED STATES MAGISTRATE JUDGE**