IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gregory A. Gibson, Petitioner, vs. L. Blair, et al., Respondents.	No. CV 07-1217-PHX-PGR (ECV) **REPORT AND RECOMMENDATION**

TO THE HONORABLE PAUL G. ROSENBLATT, UNITED STATES DISTRICT JUDGE:

BACKGROUND

Petitioner Gregory Gibson has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Doc. #1. Following a jury trial in Maricopa County Superior Court in 2003, Petitioner was convicted of one count of illegally conducting an enterprise, one count of conspiracy, and 12 counts of transport for sale, sale or transfer of marijuana. Doc. #13, Exh. AA at 3. Illegally conducting an enterprise is a class three felony and the rest are class two felonies under Arizona law. Id. On May 2, 2003, Petitioner was sentenced to 7 years in prison on the first count and 10 years on each of the remaining 13 counts, all of the terms to run concurrently. Doc. #13, Exh. AA at 13.

Petitioner appealed, and on April 2, 2004, through counsel, filed an Opening Brief in the Arizona Court of Appeals. Doc. #11, Exh. B. Petitioner alleged that he was denied a fair trial because of prosecutorial misconduct. Id. After the United States Supreme Court

decided Blakely v. Washington, 542 U.S. 296 (2004), in June 2004, Petitioner filed a Supplemental Brief on July 20, 2004, in which he claimed that the facts relied on by the court to aggravate his sentences were not decided by a jury. Doc. #11, Exh. E. On February 1, 2005, in a Memorandum Decision, the Court of Appeals affirmed the convictions but, based on Blakely, vacated Petitioner's sentences and remanded the case for resentencing. Doc. #11, Exh. G. The Arizona Supreme Court subsequently granted the State's Petition for Review and remanded the case back to the Arizona Court of Appeals for reconsideration in light of two cases decided by the Arizona Supreme Court in 2005. Doc. #13, Exh. CC. Upon reconsideration, the Court of Appeals vacated the portion of its prior decision remanding the case for resentencing and affirmed the convictions and sentences imposed by the trial court judge. Id. Petitioner then filed a *pro per* Petition for Review to the Arizona Supreme Court, which was denied on July 21, 2006. Doc. #13, Exh. DD, EE.

On June 26, 2007, Petitioner filed his habeas petition in this court. Petitioner alleges three grounds for relief: 1) that the trial court violated the Sixth and Fourteenth Amendments when it relied on facts not found by the jury to impose aggravated sentences; 2) that the trial court violated the Sixth and Fourteenth Amendments when it relied on essential elements of Petitioner's offenses as aggravating factors to impose sentences above the presumptive term; and 3) that the trial court violated the Sixth and Fourteenth Amendments by improperly imposing an aggravated sentence based on factors that were simply elements of the offenses for which he was convicted.[1] Doc. #1. The court screened the petition and directed Respondents to file an answer. Doc. #3. Respondents filed an Answer to Petition for Writ of Habeas Corpus on September 10, 2007. Doc. #8. Despite being told of the opportunity to submit a reply, Petitioner has not filed one.

[1] Although Petitioner identifies grounds two and three as separate claims, they raise the same allegation: that the trial court improperly relied on elements of the offenses as aggravating factors to enhance Petitioner's sentences. The court will, therefore, treat them as one claim.

DISCUSSION

Respondents contend in their answer that Petitioner has procedurally defaulted on grounds two and three by failing to exhaust his state court remedies. Regarding ground one, Respondents argue that Petitioner has not satisfied the standard for habeas relief. Having failed to file a reply, Petitioner has not addressed the procedural default defense.

A. Procedural Default (Grounds Two and Three)

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (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. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). A petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id. at 845. 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. Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory on which the claim is based. Bland v. Cal. Dep't of Corrections, 20 F.3d 1469, 1472-73 (9th Cir.1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc); Tamalini v. Stewart, 249 F.3d 895, 898-99 (9th Cir. 2001). "Our rule is that a state prisoner has not 'fairly presented' (and thus exhausted) his federal claims in state court unless he specifically indicated to that court that those claims were based on federal law." Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), amended on other grounds, 247 F.3d 904 (9th Cir. 2001). "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." Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996).

If a petition contains claims that were never fairly presented in state court, the federal court must determine whether state remedies remain available to the petitioner. See Rose v. Lundy, 455 U.S. 509, 519-20 (1982); Harris v. Reed, 489 U.S. 255, 268-270 (1989) (O'Connor, J., concurring). If remedies are still available in state court, the federal court may dismiss the petition without prejudice pending the exhaustion of state remedies. Id. However, if the court finds that the petitioner would have no state remedy were he to return to the state court, then his claims are considered procedurally defaulted. Teague v. Lane, 489 U.S. 288, 298-99 (1989); see also Sandgathe v. Maass, 314 F.3d 371, 376 (9th Cir. 2002) (a defendant's claim is procedurally defaulted when it is clear that the state court would hold the claim procedurally barred). The federal court will not consider these claims unless the petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Dretke v. Haley, 124 S.Ct. 1847, 1851-52 (2004); Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman v. Thompson, 501 U.S. 722, 750-51 (1991); Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

Regarding Petitioner's claim in grounds two and three, that the trial court erred by relying on factors that constituted elements of the offense to impose aggravated sentences, Petitioner failed to properly raise it in the state court. In the supplemental brief Petitioner filed in the Arizona Court of Appeals shortly after the Blakely case was decided, Petitioner raised a related claim, but not this claim. Doc. #11, Exh. E at 2. Petitioner argued that the trial court violated Blakely when it improperly found and weighed aggravating factors that it then used to impose enhanced sentences. Id. Petitioner did not, however, argue that the use of those factors was flawed because they were already taken into consideration as elements of the offenses. Rather, Petitioner's argument in his supplemental brief is a straightforward Blakely claim. He simply claimed that any aggravating factors used to enhance his sentence must be found by a jury or admitted by him, not found by the sentencing judge. That is a different claim than the one alleged in grounds two and three of

the instant petition.[2] Accordingly, Petitioner cannot point to his supplemental brief to the Arizona Court of Appeals to show he exhausted the claim in grounds two and three.

Petitioner also raised a similar claim in his *pro se* petition for review to the Arizona Supreme Court after the Court of Appeals reconsidered his case and affirmed his sentences. In the *pro se* petition, he claimed that under Arizona's statutory sentencing scheme, the court may not impose an aggravated sentence based on factors that constitute elements of the offense. Doc. #13, Exh. DD at 2-3. He argued that under A.R.S. § 13-702, the trial court was prohibited from relying on facts used to establish the elements of the offenses as aggravating factors to enhance his sentences. Id. at 11-12. Petitioner cited only state statutes and cases in his argument and at no point alleged a violation of the Sixth or Fourteenth Amendment. Id. Petitioner argued the issue strictly as a violation of state law. As such, Petitioner cannot point to his petition for review to the Arizona Supreme Court to show he exhausted the claim in grounds two and three.

By failing to fairly present the claim in grounds two and three to the Arizona Court of Appeals or the Arizona Supreme Court, Petitioner has failed to exhaust his state court remedies. Moreover, Petitioner would no longer have a remedy if he returned to the state court.[3] As a result, his claims are procedurally defaulted. Having failed to file a reply, Petitioner has not alleged cause for the default and actual prejudice, nor has he shown a miscarriage of justice to overcome the procedural default. The court will therefore recommend that these grounds for relief be denied.

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B. Blakely Claim (Ground One)

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[2] It is the same claim raised in ground one, which has not been procedurally defaulted.

[3] The time has passed to seek post-conviction relief in state court under Rule 32.4(a) of the Arizona Rules of Criminal Procedure and Petitioner has not shown that any of the exceptions to the time limits under Rule 32.1(d), (e), (f), (g) or (h) apply to him.

1. AEDPA Standard of Review

Under the AEDPA[4], a federal court "shall not" grant habeas relief with respect to "any claim that was 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. 28 U.S.C. § 2254(d); see Williams v. Taylor, 529 U.S. 362, 412-413 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). 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." Taylor, 529 U.S. at 405-06. "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). Thus, the "unreasonable application" clause requires the state court's application of Supreme Court law to be more than incorrect or erroneous; it must be objectively unreasonable. Lockyer v. Andrade, 538 U.S. 63, 75 (2003). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court ...." Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).

2. Analysis

Petitioner contends in ground one that the trial court violated Blakely when it, rather than the jury, found aggravating factors that it used to enhance Petitioner's sentences.

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

Petitioner raised the same claim in his direct appeal in the supplemental brief to the Arizona Court of Appeals.

The Arizona Court of Appeals initially agreed with Petitioner and remanded his case to the trial court for resentencing. Doc. #11, Exh. G. The Arizona Supreme Court, however, subsequently granted the State's petition for review and remanded the case to the Court of Appeals for reconsideration in light of the decisions in State v. Martinez, 210 Ariz. 578, 115 P.3d 618 (2005) and State v. Henderson, 210 Ariz. 561, 115 P.3d 601 (2005). Doc. #13, Exh. CC. Upon reconsideration, the Court of Appeals affirmed the aggravated sentences imposed by the trial court judge. Id.

The Court of Appeals explained how Martinez affected its decision:

> Martinez construed Blakely's holding with regard to the superior court's use of aggravating factors in non-capital sentencing. Martinez held that once a single aggravating factor has been found by the jury, is implicit in the jury's verdict, or has been admitted by the defendant, the sentencing judge is permitted to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in the applicable statutory sentencing range. Martinez, 210 Ariz. At 585-86, ¶¶ 26-27, 115 P.3d at 625-26.

Doc. #13, Exh. CC at 2. The Court then considered the aggravating factors identified by the trial court judge and determined that two of those factors, presence of an accomplice and commission of the offense for pecuniary gain, were implicit in the jury's verdicts. Id. at 3-4. The Court reasoned that the presence of an accomplice is implicit in the jury's verdict on both the conspiracy charge and the conducting an illegal enterprise charge. Id. at 3. The pecuniary gain aggravating factor, according to the Court, was implicit in the jury's verdict for illegally conducting an enterprise and conspiracy to transport and sell marijuana. Id. at 4.

Based on the holding in Martinez, the Court of Appeals concluded that because two of the aggravating factors relied on by the trial court were implicit in the jury's verdicts, the trial court could "find and consider other aggravating factors." Doc. #13, Exh. CC at 4. The Court therefore found no error by the trial court, vacated the portion of its prior order remanding the case for resentencing, and affirmed Petitioner's aggravated sentences.

Petitioner argues that, under Blakely, any fact that exposes a defendant to an aggravated sentence (except a prior conviction) must be found by a jury beyond a reasonable doubt. Though he does not say so explicitly, Petitioner clearly believes that Martinez was wrongly decided and argues that all of the facts relied on by the sentencing judge to enhance the sentence must be found by a jury.

The Arizona Supreme Court in Martinez explained how its holding is consistent with the U.S. Supreme Court's decisions in Jones v. United States, 526 U.S. 227 (1999), Apprendi v. New Jersey, 530 U.S. 466 (2000) and their progeny:

> The Supreme Court's recent Sixth Amendment jurisprudence, from Jones through Booker, leads inexorably to the conclusion that the Sixth Amendment does not remove from a trial judge the traditional sentencing discretion afforded the judge, so long as the judge exercises that discretion within a sentencing range established by the fact of a prior conviction, facts found by a jury, or facts admitted by a defendant. Once a jury finds the facts legally essential to expose a defendant to a statutory sentencing range, the sentencing judge may consider additional factors in determining what sentence to impose, so long as the sentence falls within the established range.

Martinez, 210 Ariz. at 583, 115 P.3d at 623.

Applying these principles to Arizona's statutory sentencing scheme, the Arizona Supreme Court concluded:

> The Sixth Amendment requires that a jury find beyond a reasonable doubt, or a defendant admit, any fact (other than a prior conviction) necessary to establish the range within which a judge may sentence the defendant. If, however, additional facts are relevant merely to the exercise of a judge's discretion in determining the specific sentence to impose on a defendant *within* a given statutory sentencing range, the Sixth Amendment permits the judge to find those facts by a preponderance of the evidence. Under A.R.S. § 13-702, the existence of a single aggravating factor exposes a defendant to an aggravated sentence. Therefore, once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute.

Martinez, 210 Ariz. at 585, 115 P.3d at 625. The Court then upheld the sentence imposed by the trial judge in which the judge relied on eight aggravating factors, only one of which was implicitly found by the jury's verdict. Id. at 585, 115 P.3d at 626. A petition for writ of certiorari to the United States Supreme Court challenging the holding in Martinez was denied. Martinez v. Arizona, 546 U.S. 1044 (2005).

Petitioner has not demonstrated that the Arizona Court of Appeals decision affirming his aggravated sentences, is contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court or based on an unreasonable determination of the facts. That decision relies on the holding in State v. Martinez, which in turn relies on the rules announced in Apprendi, Blakely, and other U.S. Supreme Court cases interpreting the Sixth Amendment right to a jury trial. As explained above, Martinez is consistent with the U.S. Supreme Court's cases on this issue and Petitioner has not shown otherwise. Because Petitioner has failed to satisfy the habeas standard for relief, the court will recommend that the claim in ground one be denied.

C. Conclusion

Having determined that grounds two and three are procedurally defaulted, and that the habeas standard for relief has not been satisfied with respect to ground one, the court will recommend that the petition be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED:

That the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. #1) be **DENIED** and **DISMISSED WITH PREJUDICE**;

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 ten 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); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely 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 to timely 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 of judgement entered pursuant to the Magistrate Judge's recommendation. See Fed. R. Civ. P. 72.

DATED this 30th day of September, 2008.

Edward C. Voss
United States Magistrate Judge