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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ABO OBAIDA HUSSEIN,)	
)	
Petitioner,)	
)	
v.)	CIV 08-01839 PHX DGC (MEA)
)	
CHARLES L. RYAN and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE DAVID G. CAMPBELL:

On or about December 18, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 19) on May 15, 2009. Petitioner was granted three extensions of the time allowed to file a reply to the answer to his petition for habeas relief. On July 30, Petitioner was allowed until September 11, 2009, to file any traverse to the answer to the petition. Although not docketed until September 24, 2009, Petitioner's reply (Docket No. 27) to the answer to his petition for habeas relief was mailed September 11, 2009; accordingly, pursuant to the prison mailbox rule Petitioner's reply is timely filed. See Houston v. Lack, 487 U.S. 266, 271-72, 108 S. Ct. 2379, 2382-83 (1988);

1 Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001).

2 **I Procedural History**

3 An indictment issued by a Maricopa County grand jury
4 charged Petitioner with four counts of sexual conduct with a
5 minor. Answer, Exh. A. Petitioner represented himself at his
6 jury trial. Id., Exh. A. The jury found Petitioner guilty on
7 the four counts charged in the indictment. Id., Exh. A. The
8 jury also found the victim was under the age of fifteen at the
9 time of the crimes. Id., Exh. A. Petitioner was sentenced to
10 a consecutive mitigated sentence of 13 years imprisonment on
11 each count of conviction. Id., Exh. A.

12 Petitioner took a direct appeal of his convictions and
13 sentences and was appointed counsel to represent him in his
14 direct appeal. Id., Exh. A. Petitioner's appointed counsel
15 filed a brief averring to the Arizona Court of Appeals that he
16 could find no legitimate issue to raise on Petitioner's behalf.
17 Id., Exh. A. Petitioner did not file a pro se brief in his
18 direct appeal. Id. at 3.

19 The Arizona Court of Appeals affirmed Petitioner's
20 convictions and sentences in a memorandum decision issued
21 January 10, 2008. Id., Exh. A. Petitioner then sought
22 translation assistance from the state Court of Appeals, which
23 denied the request. Id., Exh. B. Petitioner did not file a
24 motion for reconsideration of the decision affirming his
25 convictions and sentences nor did he seek review by the Arizona
26 Supreme Court. Id. at 3. Accordingly, the Arizona Court of
27 Appeals issued the mandate affirming Petitioner's convictions

1 opportunity to rule upon the merits of the claim by "fairly
2 presenting" the claim to the state's "highest" court in a
3 procedurally correct manner. See, e.g., Castille v. Peoples,
4 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose v.
5 Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005).

6 The Ninth Circuit Court of Appeals has concluded that,
7 in non-capital cases arising in Arizona, the "highest court"
8 test of the exhaustion requirement is satisfied if the habeas
9 petitioner presented his claim to the Arizona Court of Appeals,
10 either on direct appeal or in a petition for post-conviction
11 relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir.
12 1999). See also Crowell v. Knowles, 483 F. Supp. 2d 925, 932
13 (D. Ariz. 2007) (providing a thorough discussion of what
14 constitutes the "highest court" in Arizona for purposes of
15 exhausting a habeas claim in the context of a conviction
16 resulting in a non-capital sentence).

17 A federal habeas petitioner has not exhausted a federal
18 habeas claim if he still has the right to raise the claim "by
19 any available procedure" in the state courts. 28 U.S.C. §
20 2254(c) (1994 & Supp. 2008). Because the exhaustion requirement
21 refers only to remedies still available to the petitioner at the
22 time they file their action for federal habeas relief, it is
23 satisfied if the petitioner is procedurally barred from pursuing
24 their claim in the state courts. See Woodford v. Ngo, 548 U.S.
25 81, 92-93, 126 S. Ct. 2378, 2387 (2006); Castille, 489 U.S. at
26 351, 109 S. Ct. at 1060; Cook v. Schriro, 538 F.3d 1000, 1025-26
27 (9th Cir. 2008), cert. denied, 129 S. Ct. 1033 (2009). If it is

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1 clear the habeas petitioner's claim is procedurally barred
2 pursuant to state law, the claim is exhausted by virtue of the
3 petitioner's "procedural default" of the claim. See, e.g.,
4 Woodford, 548 U.S. at 92-93, 126 S. Ct. at 2387. Procedural
5 default occurs when a petitioner has never presented a federal
6 habeas claim in state court and is now barred from doing so by
7 the state's procedural rules, including rules regarding waiver
8 and the preclusion of claims. See Castille, 489 U.S. at 351-52,
9 109 S. Ct. at 1060; Tacho v. Martinez, 862 F.2d 1376, 1378 (9th
10 Cir. 1988).

11 Because the Arizona Rules of Criminal Procedure
12 regarding timeliness, waiver, and the preclusion of claims bar
13 Petitioner from now returning to the state courts to exhaust any
14 unexhausted federal habeas claims, Petitioner has exhausted, but
15 procedurally defaulted, any claim not previously fairly
16 presented to the Arizona courts. See Cook, 538 F. 3d at 1025-
17 26; Insyxienqmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005);
18 Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir. 2002). See also
19 Stewart v. Smith, 536 U.S. 856, 860, 122 S. Ct. 2578, 2581
20 (2002) (holding Arizona's state rules regarding the waiver and
21 procedural default of claims raised in attacks on criminal
22 convictions are adequate and independent state grounds for
23 affirming a conviction and denying federal habeas relief on the
24 grounds of a procedural bar); Ortiz v. Stewart, 149 F.3d 923,
25 931-32 (9th Cir. 1998).

1 **B. Cause and prejudice**

2 Federal habeas relief based on a procedurally defaulted
3 claim may be granted if the petitioner can demonstrate cause and
4 actual prejudice to excuse the petitioner's default of the
5 claim. See House v. Bell, 547 U.S. 518, 535-36, 126 S. Ct.
6 2064, 2076 (2006); Dretke v. Haley, 541 U.S. 386, 392-93, 124 S.
7 Ct. 1827, 1852 (2004).

8 "Cause" is a legitimate excuse for the petitioner's
9 procedural default of the claim and "prejudice" is actual harm
10 resulting from the alleged constitutional violation. See Cook,
11 538 F.3d at 1027.

12 Ordinarily, cause to excuse a default exists
13 if the petitioner can show that some
14 objective factor external to the defense
15 impeded counsel's efforts to comply with the
16 State's procedural rule. Examples of
17 sufficient causes include a showing that the
18 factual or legal basis for a claim was not
19 reasonably available to counsel, or that some
20 interference by officials made compliance
21 impracticable. Ineffective assistance of
22 counsel may be cause to excuse a default only
if the procedural default was the result of
an independent constitutional violation. Put
another way, so long as a defendant is
represented by counsel whose performance is
not constitutionally ineffective under the
standard established in Strickland v.
Washington, the federal courts discern no
inequity in requiring him to bear the risk of
attorney error that results in a procedural
default.

23 Id. (internal citations and quotations omitted). See also
24 Vickers v. Stewart, 144 F.3d 613, 617 (9th Cir. 1998); Martinez-
25 Villareal v. Lewis, 80 F.3d 1301, 1305 (9th Cir. 1996). To
26 establish prejudice, the petitioner must show that the alleged
27 constitutional error worked to his actual and substantial

1 disadvantage, infecting his entire trial with constitutional
2 violations. See Vickers, 144 F.3d at 617; Correll v. Stewart,
3 137 F.3d 1404, 1415-16 (9th Cir. 1998). The petitioner must
4 prove that, "but for" the alleged constitutional violations,
5 there is a reasonable probability he would not have been
6 convicted of the same crimes. See Manning v. Foster, 224 F.3d
7 1129, 1135-36 (9th Cir. 2000); Ivy v. Caspari, 173 F.3d 1136,
8 1141 (8th Cir. 1999). Although both cause and prejudice must be
9 shown to excuse a procedural default, the Court need not examine
10 the existence of prejudice if the petitioner fails to establish
11 cause. See Engle v. Isaac, 456 U.S. 107, 134 n.43, 102 S. Ct.
12 1558, 1575 n.43 (1982).

13 **C. Fundamental miscarriage of justice**

14 Review of the merits of a procedurally defaulted habeas
15 claim is required if the petitioner demonstrates review of the
16 merits of the claim is necessary to prevent a fundamental
17 miscarriage of justice. See Dretke, 541 U.S. at 393, 124 S. Ct.
18 at 1852; Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861
19 (1995); Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct.
20 2639, 2649 (1986). A fundamental miscarriage of justice occurs
21 only when a constitutional violation has probably resulted in
22 the conviction of one who is factually innocent. See Murray,
23 477 U.S. at 485-86, 106 S. Ct. at 2649; Thomas v. Goldsmith, 979
24 F.2d 746, 749 (9th Cir. 1992) (showing of factual innocence is
25 necessary to trigger manifest injustice relief). To satisfy the
26 "fundamental miscarriage of justice" standard, a petitioner must
27 establish by clear and convincing evidence that no reasonable

1 fact-finder could have found him guilty of the offenses charged.
2 See Dretke, 541 U.S. at 393, 124 S. Ct. at 1852; Wildman v.
3 Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001).

4 Petitioner failed to raise any claims in the Arizona
5 Court of Appeals in his direct appeal. Petitioner did not
6 pursue any state action for post-conviction relief pursuant to
7 Rule 32, Arizona Rules of Criminal Procedure. Accordingly,
8 Petitioner has failed to properly exhaust any federal habeas
9 claims in the state courts. The time allowed for filing a state
10 action for post-conviction relief pursuant to Rule 32, Arizona
11 Rules of Criminal Procedure, has now expired. Therefore,
12 Petitioner's claims are technically exhausted but procedurally
13 defaulted.

14 In reply to Respondents' answer to his petition,
15 Petitioner notes he is a refugee from Sudan, whose language is
16 Sudanese, and that he has no experience with the United States'
17 criminal justice system. Petitioner asserts the state trial
18 court denied his request to "withdraw second counsel." Docket
19 No. 27 at 2. Petitioner alleges the state trial judge violated
20 his constitutional right to due process of law. Petitioner also
21 contends he was and is wrongfully denied transcripts of his
22 criminal proceedings.

23 With regard to his procedural default of his federal
24 habeas claims, Petitioner contends his appellate counsel was
25 ineffective and did not review all of the record in Petitioner's
26 case. Id. at 3. Petitioner alleges he could not file a pro se
27 brief in his appeal because he was denied an interpreter and a

1 complete transcript of his criminal proceedings. Petitioner
2 further maintains he could not file a state action pursuant to
3 Rule 32, Arizona Rules of Criminal Procedure, because he was
4 denied full transcripts and the services of an interpreter, and
5 because he had no knowledge of this avenue of post-conviction
6 relief. Id. at 6.

7 Petitioner also argues that his state criminal
8 proceedings violated his constitutional rights because he was
9 denied a change of counsel, a speedy trial, a change of advisory
10 counsel, "full record transcripts", "access to interpreter," and
11 a hearing on his motion for a new trial.

12 Petitioner has not shown cause and prejudice with
13 regard to his procedural default of his federal habeas claims in
14 the state courts.

15 As stated supra, to satisfy the "cause and prejudice"
16 test, Petitioner bears the burden of establishing that some
17 "objective factor external to the defense impeded" his
18 compliance with Arizona's procedural rules. House, 547 U.S. at
19 535-36 126 S. Ct. at 2076; Moorman v. Schriro, 426 F.3d 1044,
20 1058 (9th Cir. 2005). Petitioner's pro se status and ignorance
21 of the law do not satisfy the cause standard for overcoming his
22 procedural default of his claims. See, e.g., Hughes v. Idaho
23 State Bd. of Corr., 800 F.2d 905, 908 (9th Cir. 1986).
24 Furthermore, Petitioner's unfamiliarity with the English
25 language is insufficient to establish cause to excuse his
26 procedural default because such alleged unfamiliarity is not
27 external to his defense. See, e.g., Bonilla v. Hurley, 370 F.3d

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1 494, 498 (6th Cir. 2004).

2 Allegedly ineffective assistance of counsel does not
3 establish cause for the failure to properly exhaust a habeas
4 claim in the state court unless the specific Sixth Amendment
5 claim alleged to provide the basis for cause was itself properly
6 exhausted. See Edwards v. Carpenter, 529 U.S. 446, 451, 120 S.
7 Ct. 1587, 1591 (2000); Tacho, 862 F.2d at 1381. Additionally,
8 “[a]ttorney error does not constitute cause to excuse a
9 procedural default unless counsel’s performance was
10 constitutionally deficient.” Deitz v. Money, 391 F.3d 804, 809
11 (6th Cir. 2004). See also Coleman, 501 U.S. at 755, 111 S. Ct.
12 at 2567 (“We reiterate that counsel’s ineffectiveness will
13 constitute cause only if it is an independent constitutional
14 violation”).

15 Even if Petitioner could show cause for his procedural
16 default of his claims, Petitioner has not established prejudice
17 arising from his default of his claims.

18 Petitioner contends he was denied the effective
19 assistance of trial counsel. Petitioner alleges his appointed
20 defense counsel did not investigate his case; *inter alia*,
21 Petitioner asserts the victim’s father convinced his daughter to
22 lie about Petitioner’s guilt because the father seized and
23 cashed Petitioner’s paycheck. Id. at 16-17. Petitioner
24 contends he repeatedly told his counsel that the victim and her
25 parents were manufacturing the allegations against him and that
26 Petitioner had evidence of these witnesses’ dishonesty. Id. at
27 20.

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1 of the Magistrate Judge.

2 DATED this 26th day of October, 2009.

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Mark E. Asper
United States Magistrate Judge