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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Elmer Levi Klink,

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No. CV-08-02210-PHX-ROS

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Petitioner,

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**ORDER**

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vs.

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Craig Fizer, et al.,

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Respondents.

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Pending before the Court is a Report and Recommendation (“R&R”) from Magistrate Judge Edward C. Voss. (Doc. 14). Judge Voss recommends the Petition for a Writ of Habeas Corpus be denied and dismissed with prejudice. Judge Voss also recommends that a certificate of appealability be denied. The R&R will be adopted in full.

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**BACKGROUND**

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In 2003, Petitioner Elmer Levi Klink was convicted in state court of numerous sexual crimes involving children. (Doc. 10-2 at 13-15). Petitioner was sentenced to 86 years in prison for the convictions. (Doc. 10-2 at 17-20). Petitioner filed a direct appeal, raising only one issue: that his request for a mistrial based on prosecutorial misconduct should have been granted. (Doc. 10-2 at 32). The Arizona Court of Appeals rejected this argument and affirmed Petitioner’s convictions. (Doc. 10-2 at 62). The Arizona Supreme Court denied review.

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1 **II. Ground Two Was Procedurally Defaulted in Part and Fails on Its Merits in Part**

2 Petitioner alleges in ground two that his trial attorney provided ineffective assistance  
3 of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments. Judge Voss  
4 identified six separate ineffective assistance claims: (1) failing to call certain witnesses; (2)  
5 Petitioner was not allowed to testify in his own behalf; (3) failing to raise objections to  
6 preserve Petitioner's right to appeal; (4) the attorney had a tape that recanted accusations; (5)  
7 allowing the prosecutor to force Petitioner's wife to testify in violation of the spousal  
8 privilege; and (6) failing to pursue the issue of the jury conversing in the hallway about the  
9 outcome of the case before the verdict.

10 **A. Claims 4 and 5**

11 Judge Voss recommends denying claims 4 and 5 as procedurally defaulted because  
12 Petitioner failed to present them in his post-conviction petition to the trial court. Petitioner  
13 objects that he did present these claims in his post conviction petition, but he does not cite  
14 to any page number. Petitioner did not present these claims in his post-conviction petition.  
15 (Doc. 10-2, Ex. P). Judge Voss's recommendation that they be denied will be adopted.

16 **B. Claims 1-3, 6**

17 Judge Voss recommends denying claims 1, 2, 3, and 6 on the merits because  
18 Petitioner failed to meet his burden of explaining how his attorney's actions constituted  
19 ineffective assistance of counsel. Petitioner fails to explain which witnesses were called and  
20 why their testimony would have changed the outcome. Petitioner does not explain why he  
21 was not allowed to testify, or why the outcome would have been different if he had.  
22 Petitioner does not say what objections his lawyer failed to raise, or how they would change  
23 the outcome. Finally, Petitioner fails to explain why his lawyer's failure to pursue the issue  
24 of the jury conversing in the hallway would have changed the outcome.

25 Petitioner objects that he was advised to state his claims briefly and in simple  
26 language. But Petitioner fails to add any further explanation as to why his attorney's actions  
27 constituted ineffective assistance of counsel. Petitioner offers only conclusory allegations.  
28 A party seeking habeas relief must supply the court with sufficient information on which to

1 assess the merits of the claims. Petitioner has not done so. Claims 1-3, and 6 of Ground Two  
2 will be denied.

3 **III. Ground Three Was Procedurally Default in Part and Fails on Its Merits in Part**

4 Petitioner alleges in ground three that his direct appeal attorney provided ineffective  
5 assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments. Judge  
6 Voss identified 12 separate allegations of ineffective assistance of counsel. Judge Voss  
7 recommends all but one of these allegations be denied as procedurally defaulted, because  
8 Petitioner failed to present them in his post-conviction petition for review to the Arizona  
9 Court of Appeals. Judge Voss identified only one allegation that was properly exhausted:  
10 appellate counsel wouldn't communicate with Defendant about the trial, despite numerous  
11 requests by mail.

12 **A. Procedurally Defaulted Claims**

13 Petitioner objects that he did raise all of the allegations in his petition for post-  
14 conviction relief. Petitioner is incorrect. With one exception, which is considered separately  
15 below, Petitioner did not fairly present his claims of ineffective assistance of counsel. (Doc.  
16 10, Ex. R.) Because his time period for presenting these claims has expired, they are  
17 procedurally defaulted and will be denied.

18 **B. Exhausted Claim Fails on Merits**

19 Petitioner properly exhausted his claim that his appellate counsel was ineffective in  
20 failing to communicate with Petitioner. Petitioner fails to explain why the outcome of his  
21 appeal would have been different if his counsel communicated with him more. Petitioner  
22 objects that he was advised to state his claims simply. But Petitioner adds no further  
23 explanation to support his claim. Petitioner fails to show ineffective assistance of appellate  
24 counsel, and the claim will be denied.

1 **IV. Ground Four Was Procedurally Defaulted**

2 Petitioner alleges in ground four that his due process rights were violated because  
3 “many petitions and motions [in the state court] have gone unanswered or addressed.” (Doc.  
4 1 at 79). Judge Voss recommends denying this ground as procedurally defaulted. Petitioner  
5 did not raise any similar claim in his direct appeal or his petition for post-conviction relief.  
6 (Doc. 10-2 at 43, 99-107). Thus, this claim is procedurally defaulted. Petitioner has not  
7 provided any basis to overcome the default.


8 Accordingly,

9 **IT IS ORDERED** the Report and Recommendation (Doc. 14) is **ADOPTED** and the  
10 Petition for Writ of Habeas Corpus (Doc. 1) **IS DENIED** and **DISMISSED WITH**  
11 **PREJUDICE.**

12 **FURTHER ORDERED** A certificate of appealability and leave to proceed *in forma*  
13 *pauperis* on appeal **IS DENIED** because the dismissal of the Petition is justified by a plain  
14 procedural bar and jurists of reason would not find the procedural ruling debatable, and  
15 Petitioner has not made a substantial showing of the denial of a constitutional right.

16 DATED this 2<sup>nd</sup> day of September, 2010.

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Roslyn O. Silver  
United States District Judge