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**NOT FOR PUBLICATION**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Eduardo Pineda-Salgado,  
Petitioner,  
vs.  
Unknown Blair, et al.,  
Respondents,

No. CV10-0775-PHX-SRB

**ORDER**

Petitioner Eduardo Pineda-Salgado filed an Amended Petition for Writ of Habeas Corpus raising two grounds for relief. Petitioner asserts that his Sixth Amendment and Due Process Rights were violated when the trial court failed to instruct the jury on the lesser included offense of theft. Petitioner also argues that his Sixth Amendment Rights were violated because the trial court sentenced him to an aggravated term of imprisonment. The Respondents responded in opposition to the Petition asserting that Petitioner's claims were procedurally defaulted and that they were without merit. Petitioner filed a reply in support of his Petition.

On May 18, 2011, the Magistrate Judge issued his Report and Recommendation recommending to this Court that the Petition be dismissed with prejudice because Petitioner failed to exhaust his state remedies, failed to show any excuse for his procedural defaults, and did not assert an actual innocence claim.

1           Petitioner filed timely written objections to the Report and Recommendation to which  
2 Respondents filed a written response. Petitioner objects to the Magistrate Judge's conclusion  
3 that he failed to properly exhaust his claims by failing to raise them as constitutional claims  
4 before the state court. He argues that because he quoted from a federal authority and cited  
5 to the state court decision in *State v. Wall*, 212 Ariz. 1, 126 P.3d 148 (2006), these citations  
6 were sufficient to put the Arizona courts on notice that he was raising a federal claim.  
7 He also asserts that because he mentioned the protection of his due process rights in his  
8 Petition for Review to the Arizona Supreme Court on his direct appeal that he did include an  
9 assertion that the failure to instruct on the lesser included offense was a federal constitutional  
10 claim. Finally, Petitioner argues that he did not knowingly and intelligently waive any  
11 claims in his Petition for Post-Conviction Relief proceedings in the state court because his  
12 lawyer didn't inform him and his lack of knowledge amounted to ineffective assistance by  
13 his counsel. Finally, the objection contains the statement, "A constitutional violation has  
14 resulted in the conviction of one who is actual innocent."

15           The response to the objections notes, as did the Magistrate Judge, that the presentation  
16 of the claim for failure to instruct on the lesser included offense of theft was presented to the  
17 state court as a state claim. The mere references to a federal case and to a state case that cites  
18 that federal case were insufficient to alert the state appellate court that Petitioner was raising  
19 a federal due process claim. Respondents also note, as did the Magistrate Judge, that the  
20 mere reference to "due process" in the Petition for Review to the Arizona Supreme Court  
21 cannot constitute a proper exhaustion of a federal claim based on its failure to say whether  
22 the reference was to the federal or state constitution and because proper exhaustion requires  
23 it to be raised at every level of review and not for the first time on Petition for Review to the  
24 Arizona Supreme Court. The response also notes that with respect to Petitioner's claim that  
25 ineffective assistance of counsel was the cause of his procedural default, that claim must be  
26 fairly presented to the state court in order to satisfy the requirements for exhaustion.  
27 *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Petitioner made no assertion of ineffective  
28 assistance of counsel in the Arizona courts and cannot raise it for the first time here. Finally,

1 the response notes that a claim of actual innocence without more does not meet the  
2 Petitioner's burden of establishing actual innocence to excuse procedural default.

3       After a *de novo* review of the record in this case, the Magistrate Judge's Report and  
4 Recommendations, the objections and the response to the objections, the Court finds itself  
5 in agreement with the Report and Recommendation of the Magistrate Judge in this case. The  
6 Court finds that Petitioner has procedurally defaulted both his claim that his federal  
7 constitutional rights were violated by the trial court's failure to give a jury instruction on a  
8 lesser included offense and that his federal constitutional rights under *Apprendi v. New*  
9 *Jersey*, 530 U.S. 466 (2000) were violated by his sentence. Neither claim was fairly  
10 presented to the state court as a federal claim. With respect to the sentencing claim, Petitioner  
11 failed to seek review of the trial court's denial of his Petition for Post-Conviction Relief with  
12 the Arizona Court of Appeals. Finally, no showing of cause and prejudice has been made  
13 or is even alleged to have been made by Petitioner. Petitioner's bare assertion that he is  
14 actually innocent is insufficient to avoid the procedural default. Because Plaintiff can no  
15 longer return to state court to attempt to exhaust, the Petition must be dismissed with  
16 prejudice.

17       IT IS ORDERED overruling the objections to the Magistrate Judge's Report and  
18 Recommendation.

19       IT IS FURTHER ORDERED adopting the Report and Recommendation as the order  
20 of this Court.

21       IT IS FURTHER ORDERED that the Amended Petition for Writ of Habeas Corpus  
22 is dismissed with prejudice.

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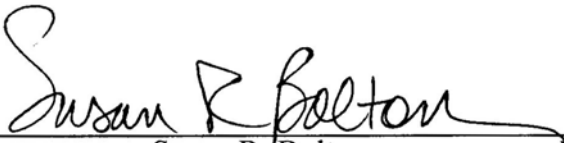
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IT IS FURTHER ORDERED that a certificate of appealability be denied because jurists of reason would not find it debatable whether this Court was correct in its procedural ruling.

DATED this 30<sup>th</sup> day of June, 2011.

  
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Susan R. Bolton  
United States District Judge