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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 Donald A. Montgomery,)

13) Petitioner,)

No. CIV 11-01467-PHX-RCB(SPL)

14) vs.)

O R D E R

15 Deputy Warden Anna Jacobs,)

16) et al.,)

17) Respondents.)

18 Pending before this court is a Petition for Writ of Habeas
19 Corpus relief brought pursuant to 28 U.S.C. § 2254 filed by
20 petitioner *pro se* Donald A. Montgomery (Doc. 1). Petitioner is
21 seeking a "remand" to Arizona state court for re-sentencing
22 without taking into account any prior convictions. See, e.g.,
23 Pet. (Doc. 1) at 12. Also pending is petitioner's motion for
24 discovery (Doc. 18), filed on April 19, 2012, while the petition
25 was pending before Magistrate Judge Steven P. Logan.

26 In his Report and Recommendation ("R & R") filed June 27,
27 2012, the Magistrate Judge recommends: (1) denying the petition
28 with prejudice; (2) denying the discovery motion; (3) denying

1 the Certificate of Appealability; and (4) denying petitioner
2 leave to proceed *in forma pauperis* on appeal. R & R (Doc. 21)
3 at 9:10-16. On July 6, 2012, petitioner timely filed objections
4 (Doc. 22). Respondents did not file any objections.

5 In accordance with 28 U.S.C. § 636(b)(1), when reviewing a
6 R & R, this court "may accept, reject or modify, in whole or in
7 part, the findings or recommendations made by the [M]agistrate."
8 28 U.S.C. § 636(b)(1). That statute "makes it clear that the
9 district judge must review the magistrate judge's findings and
10 recommendations *de novo if objection is made*, but not
11 otherwise." United States v. Reyna-Tapia, 328 F.3d 1114, 1121
12 (9th Cir. 2003) (*en banc*) (emphasis in original). Thus, as 28
13 U.S.C. § 636(b)(1)(C) requires, this court has made "a *de novo*
14 determination of those portions of the report . . . to which"
15 petitioner objected. See 28 U.S.C. § 636(b)(1)(C). Having
16 conducted such a review, for the reasons set forth below, the
17 court adopts the Report and Recommendation in its entirety.

18 **Background**

19 The background as recited in the R & R is uncontested. As
20 such, the court incorporates that background by reference and
21 adopts the same as if fully set forth herein.

22 **Discussion**

23 When the Magistrate Judge issued the R & R, petitioner's
24 petition for post-conviction relief as to his re-sentencing was
25 pending before the Arizona Court of Appeals, where it remains
26 pending as July 27, 2012, the date of the filing and entry of
27 this order. <http://apps.supremecourt.azgov/aacc/1ca> - 1CA-CR
28 11-0051 PRPC (last visited July 27, 2012). Under these

1 circumstances, the Magistrate Judge correctly stated: “[A]
2 federal court may deny an unexhausted petition on the merits
3 only when it is perfectly clear that the applicant does not
4 raise even a colorable claim.” R & R (Doc. 21) at 4:18-19
5 (quoting Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir.
6 2005)). The R & R also accurately recites federal habeas relief
7 may only be granted when state court proceedings: “(1) resulted
8 in a decision that was contrary to, or involved an unreasonable
9 application of, clearly established Federal law, as determined
10 by the Supreme Court of the United States; or (2) resulted in
11 a decision that was based on an unreasonable determination of
12 the facts in light of the evidence presented in the State court
13 proceeding.” See id. at 4:24-5:1 (citing, *inter alia*, 28
14 U.S.C. § 2251(d)). The Supreme Court has clarified, as the
15 Magistrate Judge further pointed out, that even an erroneous or
16 incorrect application of clearly established federal law does
17 not support a habeas grant, unless the state court’s application
18 was “objectively unreasonable.” Lockyer v. Andrade, 538 U.S.
19 63, 75-76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

20 **I. Ineffective Assistance of Counsel**

21 Guided by these standards, the Magistrate Judge recommends
22 denying petitioner’s first ground for habeas relief, wherein
23 petitioner claims ineffective assistance of counsel in violation
24 of the Sixth Amendment. Petitioner claims ineffective
25 assistance of counsel because at his sentencing hearing, and
26 without his consent, his trial counsel stipulated to prior
27 convictions. In seeking habeas relief on this basis, petitioner
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1 does not take into account, as the Magistrate Judge soundly and
2 accurately reasoned, that petitioner has "already received the
3 relief to which he was entitled for his trial counsel's
4 ineffective assistance at his first sentencing hearing." R &
5 R (Doc. 21) at 6:10-11.

6 In particular, after his sentencing, petitioner was
7 successful in seeking post-conviction relief. The trial court
8 vacated petitioner's original sentence conducted a new
9 sentencing hearing. After the re-sentencing hearing, where
10 there was no stipulation to prior convictions, petitioner was
11 sentenced to the same sentence previously imposed, *i.e.*, an
12 aggravated term of 12 years on the class 4 felony and the
13 presumptive term of 3.75 years on each of the remaining three
14 offenses, all to be served concurrently. See Pet., exh. I
15 thereto (Doc. 1-2) at 59:9-15.¹

16 Not only has petitioner already received the relief which
17 he is seeking in the pending petition, but as the R & R also
18 notes, in petitioner's direct appeal after re-sentencing, the
19 Arizona Court of Appeals held, based upon state law, that its
20 review was limited to the re-sentencing proceedings. R & R
21 (Doc. 21) at 6:14-16 (citing Doc. 12 [Ans.], Exh. BBB (Doc. 12-
22 3) at 6-8). Therefore, that Court did not address petitioner's
23 arguments which "focus[ed] entirely on his trial and first
24 sentencing. Ans. (Doc. 12), exh. BBB (Doc. 12-3) thereto at 7
25 ¶ 11.

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27 ¹ The Arizona Court of Appeals, Division One, affirmed petitioner's
28 sentences. Ans., exh. BBB thereto (Doc. 12-3). No petition for review was
filed in the Arizona Supreme Court.

1 The R & R recognizes that "the Court of Appeals relied on
2 state law to conclude that its review was limited to the
3 resentencing proceedings[.]" Id. at 6:17-18; see also Ans., exh.
4 BBB thereto (Doc. 12-3) at 7, ¶ 11. Significantly, however, the
5 R & R correctly states that:

6 Petitioner has presented nothing in
7 his reply to show that the Court
8 of Appeals decision is contrary
9 to or an unreasonable application of United
10 States Supreme Court law. . . . Nor has
11 Petitioner shown that the decision was
12 based on an unreasonable determination
13 of the facts given the evidence presented
14 in the state court.

15 R & R (Doc. 21) at 6:18-21 (citation omitted). Concluding, the
16 R & R found that "[b]ecause Petitioner has already been granted
17 relief on the claim raised in ground one, and has failed to show
18 that he is entitled to any further relief," it recommend denial
19 of habeas relief based upon ground one. Id. at 6:22-24.

20 Petitioner lists four objections to this first
21 recommendation. None have merit, as will readily become
22 apparent. Initially, petitioner complains that the Arizona
23 Court of Appeals "chose not [to] review [his] ineffective
24 assistance of counsel cliam's [sic] on direct appeal[]." Obj.
25 (Doc. 22) at 3:20-21. As explained above though, petitioner has
26 not shown that declining such a review somehow entitles him to
27 habeas relief under 28 U.S.C. § 2254. Moreover, petitioner does
28 not in any way expand upon the basis for this objection, which
on its face has no validity.

 Second, petitioner objects stating only that "Sixth
Amendment violations are properly raise[d] in the District

1 Co[u]rt on habeas corpus." Id. at 3:21-24 (citation omitted).
2 The court fails to see how this statement raises a proper
3 objection to the R & R. This is especially so considering that
4 nowhere in the R & R does it indicate to the contrary, *i.e.*,
5 that petitioner's alleged Sixth Amendment violation is not
6 properly before this court. Rather, the R & R properly found
7 no merit to petitioner's ineffective assistance of counsel
8 claim.

9 Third, petitioner objects because "the trial court applied
10 [sic] Strickland [v.] Washington, 466 U.S. at 688, 104 S.Ct.
11 2052 'unreasonable.'" Id. at 3:25-26. Petitioner does not
12 expand in any way upon the basis for this objection, and its
13 exact nature is unclear. Perhaps petitioner is arguing that his
14 re-sentencing was unreasonable. If so, petitioner has utterly
15 failed to met his burden in this regard as well.

16 Petitioner's fourth objection is that he "is entitled to
17 further" unspecified "relief." Obj. (Doc. 22) at 3 - 4:1.
18 This, too, is not a valid objection to any of the Magistrate
19 Judge's findings or recommendations.

20 In short, there is no merit to any of petitioner's
21 objections to the R & R's recommendation to deny his first
22 ground for habeas relief.

23 **II. "Excessive and Cruel" Sentence**

24 The petition contains a second ground for habeas relief.
25 It broadly alleges violations of "fundamental fairness, equal
26 protection and due process" in violation of the Fifth, Sixth,
27 Eighth, Ninth and Fourteenth amendments of the United States
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1 Constitution. Pet. (Doc. 1) at 13. Ground two also encompasses
2 petitioner's claim that his sentence was "excessive and cruel."
3 Id. As with ground one, the primary factual basis for the
4 foregoing is petitioner's claim that "his initial sentence was
5 based on an erroneous stipulation of prior felony convictions."
6 See R & R (Doc. 21) at 3:23-24. Ground two also includes a
7 claim that petitioner's re-sentencing violated the Double
8 Jeopardy Clause.

9 As to the petitioner's arguments regarding his initial
10 sentence, and "how it was based on an erroneous stipulation to
11 prior felony convictions[,] " the Magistrate Judge found "those
12 arguments [to be] irrelevant in light of the relief [petitioner]
13 was granted." Id. at 7:2-4. Further, after correctly analyzing
14 petitioner's Double Jeopardy claim, the Magistrate Judge found
15 that petitioner "presented nothing to demonstrate that the
16 Arizona Court of Appeals [sic] decision denying his double
17 jeopardy claims is contrary to or an unreasonable application
18 of clearly established United States Supreme Court law." Id.
19 at 7:22-24.

20 Indeed, now petitioner concedes the inapplicability of the
21 Double Jeopardy Clause. See Obj. (Doc. 22) at 4:8-9. Thus, at
22 this juncture petitioner's only objection regarding ground two
23 is that his sentence is "excessive and cruel[.]" Id. at 4:6.
24 Petitioner offers no basis whatsoever for this objection,
25 however, and the court finds it, too, to be without merit.

26 **III. Other Sentencing Issues**

27 Ground three of the petition is another iteration of
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1 petitioner's ineffective assistance of trial counsel at his
2 initial sentencing. This ground also includes allegations of
3 judicial and prosecutorial misconduct, both related to his
4 initial sentencing.

5 After carefully reviewing both ground three of the petition
6 and the R & R addressing that ground, this court hereby adopts
7 the Magistrate Judge's factual findings and legal conclusions
8 in that regard. See R & R (Doc. 21) at 8:2-20. Accordingly,
9 it agrees with the Magistrate Judge that ground three provides
10 no basis for granting habeas relief pursuant to 28 U.S.C. §
11 2254. See id. at 8:20-21.

12 Because "it is perfectly clear that [petitioner] does not
13 raise even a colorable federal claim[,] " in his unexhausted
14 petition, the court adopts the Magistrate Judge's R & R and
15 denies this petition with prejudice. See Cassett, 406 F.3d at
16 623-24.

17 **IV. Discovery**

18 Petitioner's discovery motion seeks permission to propound
19 four interrogatories upon respondents. See Mot. (Doc. 18) at
20 5. Citing to Sivak v. Hardison, 658 F.3d 898, 927 (9th Cir.
21 2011), the Magistrate Judge correctly stated, "[d]iscovery is
22 available in a § 2254 habeas case only in the discretion of the
23 court and upon a showing of good cause." R & R (Doc. 21) at
24 8:24-26. Finding "that answers to the interrogatories would
25 have no bearing on the Court's analysis of recommendation[,] "
26 and because "[p]etitioner waited until months after briefing was
27 completed to even make the request[,] " the Magistrate Judge
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1 recommends denying this motion. Id. at 8:26-9:2.

2 Petitioner objects asserting that the "facts" sought
3 through those interrogatories "sup[p]ort . . . his ineffective
4 assistance cl[ai]m[,]" and his "entitle[ment] to further
5 relief." Obj. (Doc. 22) at 4:21-23. There is nothing in the
6 record before this court supporting that bald objection,
7 however. Consequently, the court agrees with and adopts the
8 Magistrate Judge's factual findings and legal conclusions and
9 denies petitioner's discovery motion.

10 **V. Certificate of Appealability/In Forma Pauperis Status**

11 Lastly, "because [p]etitioner [did] not ma[k]e a
12 substantial showing of the denial of a constitutional right[,]"
13 the Magistrate Judge recommends denying a certificate of
14 appealability and denying petitioner leave to proceed *in forma*
15 *pauperis* on appeal. R & R (Doc. 21) at 9:14-16. Plaintiff's
16 mere disagreement with this finding, without more, does not
17 warrant a different finding by this court. See Obj. (Doc. 22)
18 at 4:24-5:5. Thus, the court agrees with the Magistrate Judge's
19 recommendation in this regard.

20 **Conclusion**

21 To summarize, and for the reasons set forth above, **IT IS**
22 **HEREBY ORDERED** that:

23 (1) United States Magistrate Judge Logan's Report and
24 Recommendation (Doc. 21) is **ADOPTED** [as the findings of fact and
25 conclusions of law by this court];

26 (2) the Petition for Writ of Habeas Corpus (Doc. 1) is
27 **DENIED;**

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1 (3) plaintiff's "Motion for an [sic] Request For Discovery
2 Habeas Corpus Cases Rule 6" (Doc. 18) is **DENIED**;

3 (4) a Certificate of Appealability and leave to proceed *in*
4 *forma pauperis* on appeal is **DENIED**; and

5 (5) that the Clerk of the Court shall enter judgment in
6 accordance with this Order **DISMISSING** this petition **WITH**
7 **PREJUDICE**.

8 DATED this 27th day of July, 2012.

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Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record and petitioner *pro se*