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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Theodore M. Gomez,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

) No. CV11-1472-PHX-SRB

) **ORDER**

_____)
Petitioner, Theodore M. Gomez, filed his Petition for Writ of Habeas Corpus on July 26, 2011 raising one claim. Petitioner alleges that the sentence imposed upon him in 1996 for crimes occurring in 1995 was not authorized by state statute. He claims that his sentence to a term of lifetime probation was in violation of his right to due process of law. Respondents answered the petition and urged that it be denied and dismissed with prejudice because no federal claim was fairly presented in state court resulting in Petitioner's failure to exhaust his state court remedies before bringing his claim in this court. Alternatively, Respondents argue that Petitioner's present claim for due process violations is not cognizable under federal habeas review because his claim of an illegal sentence does not raise federal constitutional questions. Petitioner filed a reply in support of his petition on November 15, 2011.

On November 23, 2011 the Magistrate Judge issued his Report and Recommendation

1 recommending that the petition be denied because Petitioner had failed to exhaust his habeas
2 claim in state court because he failed to raise his claim as a federal due process violation and
3 because Petitioner alleges only that the state court erred in application of state sentencing
4 laws, a claim that does not state a cognizable claim for federal habeas relief. Petitioner filed
5 objections on December 21, 2011.

6 Petitioner's objections to the Report and Recommendation argue that the Report and
7 Recommendation incorrectly concluded that he had not clearly presented his claim in state
8 court because he failed to raise his claim as a violation of federal constitutional rights.
9 Petitioner states, "As the record provides and the petitioner still contends the trial court
10 exceeded his jurisdiction by imposing sentence outside rule and statute. Repugnant to both
11 State and Federal Constitutions." (Doc. 18, Objections to Report & Recommendation at 3).
12 Petitioner did not address the Magistrate Judge's alternative finding that, "Absent a showing
13 of fundamental unfairness, federal habeas corpus relief is not available for a state court's
14 misapplication of its own sentencing laws." (Doc. 15, Report & Recommendation at 12).

15 After review of the petition, answer and reply along with the Report and
16 Recommendation and Petitioner's objections, the Court finds itself in agreement with the
17 Report and Recommendation of the Magistrate Judge and concludes that Petitioner's
18 objections should be overruled. The Court agrees with the Magistrate Judge that Petitioner
19 did not clearly present his claim in state court on his Petition for Post-Conviction Relief as
20 a violation of his federal constitutional rights but merely alleged generally a violation of his
21 federal and state constitutional rights. The Court also agrees with the Magistrate Judge that
22 even if Petitioner had properly attempted to bring his claim as a violation of federal
23 constitutional rights federal habeas corpus relief would not be available because Petitioner's
24 claim is that the state court misapplied its own sentencing laws.

25 IT ORDERED overruling the objections to the Report and Recommendation of the
26 Magistrate Judge.

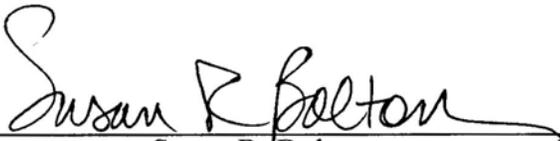
27 IT IS FURTHER ORDERED adopting the Report and Recommendation of the
28 Magistrate Judge as the order of this Court. (Doc. 15).

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IT IS FURTHER ORDERED that Petition for Writ of Habeas Corpus is denied and dismissed with prejudice.

IT IS FURTHER ORDERED denying a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right.

DATED this 19th day of January, 2012.



Susan R. Bolton
United States District Judge