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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Abelardo Rivera, Jr.,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

No. CV-11-01935-PHX-PGR (ECV)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Voss notwithstanding that no party has filed any objections to the Report and Recommendation, the Court finds that the Magistrate Judge correctly determined that the petitioner's Petition for a Writ of Habeas Corpus, timely filed pursuant to 28 U.S.C. § 2254, should be denied with prejudice.

The Court agrees with the Magistrate Judge that the single claim raised by the petitioner, which is that the state trial court committed fundamental constitutional error in denying a mistrial based on a prosecution witness' improper testimony, is procedurally defaulted because the petitioner failed to exhaust the claim by presenting it to the state courts at all levels of review in a procedurally proper manner. The Court further agrees that the petitioner has not shown any cause for

1 the procedural default or any resulting prejudice, nor has he shown any fundamental
2 miscarriage of justice; furthermore, he does not contend that he is actually innocent
3 of the aggravated DUI and disorderly conduct crimes of which he was convicted.

4 Therefore,

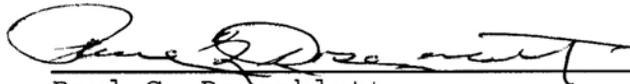
5 IT IS ORDERED that the Magistrate Judge's Report and Recommendation
6 (Doc.13) is accepted and adopted by the Court.

7 IT IS FURTHER ORDERED that the petitioner's Petition Under 28 U.S.C.
8 § 2254 for a Writ of Habeas Corpus by a Person in State Custody is denied and that
9 this action is dismissed with prejudice.

10 IT IS FURTHER ORDERED that a certificate of appealability shall not be
11 issued and that leave to appeal *in forma pauperis* is denied because the petitioner
12 has not made a substantial showing of the denial of a constitutional right.

13 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
14 accordingly.

15 DATED this 8th day of July, 2013.

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18 Paul G. Rosenblatt
19 United States District Judge
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