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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Paul Bryan De Los Rios,  
Petitioner,  
v.  
Charles L. Ryan, Director of the  
Department of Corrections, et al.,  
Respondents.

No. CV-12-00839-PHX-GMS

**ORDER**

Pending before the Court are Petitioner Paul Bryan De Los Rios’s Petition for Writ of Habeas Corpus (Doc. 1) and Petitioner’s Motions to Produce Documents. (Docs. 24-25.) Magistrate Judge David K. Duncan issued a Report and Recommendation (“R&R”) in which he recommended that the Court deny the petition with prejudice. (Doc. 13.) De Los Rios filed objections to the R&R. (Doc. 23.) Because objections have been filed, the Court will review the petition de novo. *See United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). For the following reasons, the Court accepts the R&R and denies the petition. The Court also denies De Los Rios’s Motions to Produce Documents.

**BACKGROUND**

De Los Rios was convicted by a jury in Maricopa County Superior Court, case #CR2001-14225, of first degree murder and two counts each of kidnapping and child

1 abuse. (Doc. 11, Ex. A at 5.) De Los Rios was sentenced to natural life in prison for the  
2 charge of first degree murder and consecutive terms of ten year's incarceration for each  
3 of the kidnapping and child abuse charges, to be served consecutive to the life sentence.  
4 (*Id.*) De Los Rios filed a timely notice of appeal. (*Id.*)

5 De Los Rios's counsel filed an *Anders* brief on October 31, 2008, stating that he  
6 found no arguable question of law that is not frivolous. (*Id.*, Ex. A, B.) De Los Rios, as  
7 permitted by Arizona law, then filed a supplemental brief pro se. (*Id.*) In his brief, he  
8 raised the following claims: (1) the grand jury proceeding was flawed and the trial court  
9 had improperly amended the indictment at trial; (2) the jury instruction defining  
10 "reckless," as set out in the lesser included offenses, was improper; (3) the trial court  
11 erred in not allowing De Los Rios to interview Son, who testified for the State, prior to  
12 trial; (4) Son gave false testimony at trial as reflected by contradicting statements given  
13 by a nontestifying witness; and (5) the State presented insufficient evidence to sustain the  
14 verdicts. (*Id.*) The Court of Appeals affirmed De Los Rios's convictions and sentences on  
15 March 3, 2009. (*Id.*, Ex. A.) The Arizona Supreme Court denied review on June 30,  
16 2009. (*Id.*)

17 De Los Rios filed a Notice of Post-Conviction Relief on November 10, 2008, and  
18 a subsequent Petition for Post-Conviction Relief. (*Id.*, Ex. D.) The petition raised one  
19 claim: that the trial court had erred in denying a defense motion to limit argument  
20 regarding the murder count, resulting in an improper amendment to the indictment and  
21 thus denying him a grand jury determination on probable cause, the effective assistance  
22 of counsel, and a unanimous jury verdict. (*Id.*) On July 27, 2010, the Superior Court  
23 dismissed the petition for post-conviction relief. (*Id.*, Ex. E.)

24 De Los Rios then petitioned for review of the denial of his petition at the Arizona  
25 Court of Appeals, raising two claims: (1) the trial court improperly amended the  
26 indictment; and (2) trial counsel rendered ineffective assistance by failing to challenge  
27 the amended indictment. (*Id.*, Ex. F.) The Arizona Court of Appeals denied review on  
28 March 28, 2012. (*Id.*, Ex. G.)

1 De Los Rios filed the instant petition for writ of habeas corpus on April 23, 2012.  
2 (Doc. 1.) In his petition, De Los Rios names Charles Ryan as Respondent and the  
3 Arizona Attorney General as an Additional Respondent. He cites three grounds for relief:  
4 (1) trial counsel rendered ineffective assistance by failing to object to an amended  
5 indictment; (2) trial counsel failed to provide De Los Rios with complete copies of  
6 discovery; and (3) The Arizona Department of Corrections denied him use of the law  
7 library. (Doc. 1.) This Court subsequently dismissed Ground Three in its May 16, 2012  
8 order. (Doc. 4.)

9 Magistrate Judge Duncan issued an R&R on April 24, 2013, in which he  
10 recommended denial of the petition with prejudice. (Doc. 13.) De Los Rios filed his  
11 objections to the R&R on July 16, 2013, (Doc. 23), and the Court will now review the  
12 petition de novo.

## 13 DISCUSSION

### 14 I. LEGAL STANDARD

15 The writ of habeas corpus affords relief to persons in custody in violation of the  
16 Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241(c)(3)(2006). Review  
17 of Petitions for Habeas Corpus is governed by the Antiterrorism and Effective Death  
18 Penalty Act of 1996 (“AEDPA”). *Id.* U.S.C. § 2244 et seq.

19 A petitioner is required to exhaust his claim in state court before seeking federal  
20 habeas relief. 28 U.S.C. § 2254(b)(1)(A). To satisfy that requirement, a petitioner must  
21 “give the state courts an opportunity to act on his claims before he presents those claims  
22 to a federal court in a habeas petition.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).  
23 In Arizona, a petitioner is required to “fairly present” all claims he seeks to assert in his  
24 habeas proceeding first to the Arizona Court of Appeals either through direct appeal or  
25 the State’s post-conviction relief proceedings. *Swoopes v. Sublett*, 196 F.3d 1008, 1010  
26 (9th Cir. 1999).

27 For a petitioner to have fairly presented his claims to the appropriate state courts,  
28 he must have described the operative facts and the federal legal theory that support his

1 specific claim. *See Baldwin v. Reese*, 541 U.S. 27, 29, 31 (2004); *Scott v. Schriro*, 567  
2 F.3d 573, 582 (9th Cir. 2009) (per curiam) (“Full and fair presentation . . . requires a  
3 petitioner to present the substance of his claim to the state courts, including a reference to  
4 a federal constitutional guarantee and a statement of facts that entitle the petitioner to  
5 relief.”), *cert. denied sub nom Ryan v. Scott*, 558 U.S. 1091 (2009).

6 If a petitioner has failed to “fairly present” his federal claims to the state courts—  
7 and has therefore failed to fulfill AEDPA’s exhaustion requirement—the habeas court  
8 must determine whether state remedies are still available for the petitioner; if not, those  
9 claims are procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1  
10 (1991) (“[I]f the petitioner failed to exhaust state remedies and the court to which the  
11 petitioner would be required to present his claims in order to meet the exhaustion  
12 requirement would now find the claims procedurally barred[,] . . . there is a procedural  
13 default for purposes of federal habeas . . .”).

14 A habeas court will consider claims that the petitioner has procedurally defaulted  
15 only if he can demonstrate (1) cause for his failure to comply with state rules and actual  
16 prejudice or, in the very rare instance, (2) a miscarriage of justice. *See Dretke v. Haley*,  
17 541 U.S. 386, 388–89 (2004). “Cause” means “some objective factor external to the  
18 defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v.*  
19 *Carrier*, 477 U.S. 478, 488 (1986). Even if a petitioner demonstrates cause for a  
20 procedural default, he must nevertheless show “prejudice” or that the supposed  
21 constitutional error “worked to his actual and substantial disadvantage, infecting his  
22 entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152,  
23 170 (1982). Finally, a miscarriage of justice is shorthand for a situation “where a  
24 constitutional violation has ‘probably resulted’ in the conviction of one who is ‘actually  
25 innocent’ of the substantive offense.” *Dretke*, 541 U.S. at 393 (quoting *Murray v.*  
26 *Carrier*, 477 U.S. 478, 496 (1986)).

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1 **II. APPLICATION**

2 Magistrate Judge Duncan correctly concluded that De Los Rios’s claims are both  
3 unexhausted and procedurally defaulted.

4 **A. Exhaustion**

5 **1. Ground One: Ineffective Assistance of Counsel**

6 In Ground One, De Los Rios argues that trial counsel rendered ineffective  
7 assistance in failing to object to the amended indictment. De Los Rios failed to properly  
8 raise this particular claim in state court and thus has not exhausted the claim. In his  
9 petition for post-conviction relief, he argued that in denying defense counsel’s motion to  
10 limit argument regarding the murder count, resulting in an improper amendment to the  
11 indictment, the *trial court* denied him the effective assistance of counsel. (Doc. 11, Ex. D  
12 at 1–2.) That is a different claim from Ground One in the instant petition. De Los Rios  
13 raised the claim in Ground One for the first time in his petition for review of the denial of  
14 his petition for post-conviction relief to the Arizona Court of Appeals. (*Id.*, Ex. F at 4–5.)  
15 The presentation of one ground of ineffective assistance in the post-conviction  
16 proceeding does not exhaust other grounds related to counsel’s performance and raised  
17 for the first time in a petition for review. *See Beaty v. Stewart*, 303 F.3d 975, 989–90 (9th  
18 Cir. 2002). Therefore, Ground One was not fairly presented and is unexhausted.

19 **2. Ground Two: Counsel’s Failure to Provide Complete Copies of**  
20 **Discovery**

21 In Ground Two, De Los Rios claims that trial counsel failed to provide him with  
22 complete copies of discovery. De Los Rios made this argument on direct appeal, but the  
23 Court of Appeals declined to address the claim because it related to De Los Rios’s  
24 representation and was not properly before the court. (Doc. 11, Ex. A at 7–8.) De Los  
25 Rios made the same claim in his notice of post-conviction relief (*Id.*, Ex. C at 8), but he  
26 did not actually raise the claim in his subsequent pro se petition or in his petition for  
27 review. Therefore, Ground Two was not fairly presented and is unexhausted.

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1           **B. Procedural Default**

2           De Los Rios would have no state remedy were he to return to state court and thus  
3 his claims are procedurally defaulted. The Court will not consider his procedurally  
4 defaulted claims as he has neither established cause and prejudice nor a miscarriage of  
5 justice to excuse the default. *Dretke*, 541 U.S. at 388–89.

6           To establish cause, De Los Rios must show that he was prevented from complying  
7 with the procedural rule by the ineffective assistance he received. However, his claims of  
8 ineffective assistance do not relate to his failure to exhaust either of his current claims.  
9 Further, De Los Rios filed his post-conviction petition pro se. Thus, De Los Rios has not  
10 shown that it was his counsel’s deficient performance that prevented him from fairly  
11 presenting either his ineffective assistance claim or claim regarding the failure to provide  
12 complete copies of discovery to state court. De Los Rios does not raise any other claims  
13 or facts that could constitute cause. The Court need not examine the existence of  
14 prejudice if the petitioner fails to establish cause. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43  
15 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir. 1991).

16           De Los Rios asserts that the violations asserted in his petition amount to a  
17 miscarriage of justice. (Doc. 23 at 5–6.) A successful miscarriage of justice claim  
18 requires a showing that the constitutional violations “‘probably resulted’ in the conviction  
19 of one who is ‘actually innocent’ of the substantive offense.” *Dretke*, 541 U.S. at 393.  
20 That, in turn, requires presentation of new evidence that “it is more likely than not that no  
21 reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup*,  
22 513 U.S. at 327. De Los Rios asserts that he is actually innocent, but he does not  
23 elaborate. (Doc. 23 at 6.) He provides no new evidence to support this assertion.

24           Further, procedural errors like those raised by De Los Rios are insufficient to  
25 make a showing of miscarriage of justice. Only new evidence that shows that no  
26 reasonable juror would have found Petitioner guilty beyond a reasonable doubt will  
27 suffice. In the absence of such evidence, De Los Rios fails to establish a miscarriage of  
28 justice.

