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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Eitan Maximov,

10 Petitioner,

11 v.

12 USA,

13 Respondent.  
14

No. CV-14-00636-PHX-DGC

**ORDER**

15 Petitioner objects to the Magistrate Judge's Report and Recommendation  
16 ("R&R"). Doc. 16. The R&R suggests that this Court dismiss the pro se petition brought  
17 pursuant to 28 U.S.C. § 2255. Doc. 15. Specifically, the Magistrate Judge found that  
18 Petitioner's claims are procedurally barred. The matter is fully briefed, and no party has  
19 requested oral argument. The Court will dismiss the petition.

20 **I. Background.**

21 Petitioner Eitan Maximov was convicted of one count of conspiracy to commit  
22 wire or bank fraud and one count of bank fraud. At sentencing, the Court found  
23 Maximov was "clearly an organizer," and thus applied the Aggravating Role sentence  
24 enhancement. Ultimately, the Court sentenced Maximov to 97 months in prison.

25 Maximov appealed his conviction, and, after counsel was appointed, requested an  
26 international prison transfer to his home country of Israel. He later decided to dismiss his  
27 appeal after he "learned that international prison transfer requests will not be considered  
28 during the pendency of an appeal[.]" Doc. 15 at 2. Counsel warned, however, that

1 dismissing the appeal would preclude his ability to raise certain claims because “they  
2 were not raised on direct appeal.” *Id.* Nonetheless, Maximov dismissed the appeal and  
3 signed an affidavit acknowledging that dismissing his appeal would affect his right to  
4 collaterally attack his conviction and sentence.

5 On March 28, 2014, Maximov filed a petition pursuant to 28 U.S.C. § 2255  
6 arguing that the sentencing guidelines were applied incorrectly, that the indictment was  
7 defective, and that he received ineffective assistance of both trial and appellate counsel.  
8 On June 22, 2015, Magistrate Judge David Duncan issued an R&R recommending that  
9 the Court dismiss Maximov’s claims because they are procedurally barred. *Id.* at 3.  
10 Maximov filed objections to the R&R. Doc. 16.

## 11 **II. Legal Standard.**

### 12 **A. Objections.**

13 The Court may accept, reject, or modify, in whole or in part, the findings or  
14 recommendations made by a magistrate judge in a habeas case. *See* 28 U.S.C.  
15 § 636(b)(1). The Court must undertake a de novo review of those portions of the R&R to  
16 which specific objections are made. *See id.*; Fed. R. Civ. P. 72(b)(3); *United States v.*  
17 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

### 18 **B. Procedural Default.**

19 Generally, “claims not raised on direct appeal may not be raised on collateral  
20 review[.]” *Massaro v. United States*, 538 U.S. 500, 504 (2003). In such a case, the  
21 claims are procedurally defaulted and “may be raised in habeas only if the defendant can  
22 first demonstrate either cause and actual prejudice, or that he is actually innocent.”  
23 *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal quotation marks and  
24 citations omitted). Claims for ineffective assistance of counsel, however, are not subject  
25 to this rule, and therefore may be raised on collateral attack even if they were not directly  
26 appealed. *See Massaro*, 538 U.S. at 509 (“We do hold that failure to raise an ineffective-  
27 assistance-of-counsel claim on direct appeal does not bar the claim from being brought in  
28 a later, appropriate proceeding under § 2255.”).

1 **III. Analysis.**

2 Maximov argues that (1) the Court applied the wrong sentencing guidelines  
3 resulting in a higher sentence, (2) the Court improperly applied the Aggravating Role  
4 enhancement, (3) his attorney was ineffective for failing to object to the application of the  
5 guidelines, (4) his attorney was ineffective for failing to advise him of these issues on  
6 appeal, and (5) the indictment was defective. Doc. 3. The Magistrate Judge found all of  
7 these claims procedurally barred because Maximov failed to raise them on direct appeal.  
8 Importantly, Maximov’s objections do not challenge any specific portion of the R&R.  
9 Although this failure would preclude Maximov’s right to de novo review, *see Howard v.*  
10 *Sec’y of HHS*, 932 F.2d 505, 509 (9th Cir. 1991) (failure to file specific objections to  
11 R&R “has the same effect as would a failure to object”), the Court will address Judge  
12 Duncan’s findings.

13 The Court agrees that Maximov’s claims relating to the application of the  
14 sentencing guidelines, the sentencing enhancement, and the indictment are barred  
15 because he failed to raise them on direct appeal. Maximov does not dispute that he failed  
16 to raise these claims on direct appeal and that he executed an affidavit acknowledging  
17 that by voluntarily dismissing his appeal he waived further review. The Court will not  
18 address these claims.

19 Maximov’s ineffective assistance of counsel claims, however, are not procedurally  
20 barred. *See Massaro*, 538 U.S. at 509. Although Judge Duncan found otherwise, this  
21 does not change the outcome. Judge Duncan addressed the merits of Maximov’s  
22 ineffective assistance of counsel claims in analyzing whether Maximov had demonstrated  
23 sufficient cause to overcome the procedural bar rule. Maximov argued that he should  
24 have been sentenced under the 1998 guidelines, which would have resulted in a lesser  
25 sentence. He argued his counsel was ineffective for failing to raise this claim on appeal.  
26 But as Judge Duncan correctly noted, the conduct underlying Maximov’s conviction  
27 occurred between 2006 at 2008. Doc. 10-4 at 4 (charging Maximov for a conspiracy to  
28 commit several crimes that took place “[o]n or about July 2006 and continuing to and

1 including a date unknown to the grand jury, but at least until January 8, 2008”).  
2 Maximov was sentenced for crimes charged in the indictment. There is no basis for  
3 concluding that he was sentenced for crimes that occurred when the 1998 version of the  
4 guidelines was in effect, and thus counsel was not ineffective in failing to raise this issue.

5 Maximov also argues his counsel was ineffective for failing to object to the  
6 Aggravated Role enhancement. He claims there was no evidence that other participants  
7 were “working” for him and that he had no control over their conduct. But as Judge  
8 Duncan noted, counsel did object to the enhancement at sentencing, arguing that the  
9 government failed to present evidence that any single participant in the conspiracy was  
10 the leader. Doc. 10-1 at 48. The mere fact that the Court rejected the argument does not  
11 render counsel’s performance objectively unreasonable under *Strickland v. Washington*,  
12 466 U.S. 668 (1984).

13 Petitioner’s claims challenging his sentence and the validity of the indictment are  
14 procedurally barred and his claims for ineffective assistance of counsel are meritless.  
15 The petition will be denied.

16 **IT IS ORDERED:**

- 17 1. Petitioner’s petition for writ of habeas corpus (Doc. 1) is **denied**.
- 18 2. Magistrate Judge David K. Duncan’s R&R (Doc. 15) is **accepted**.
- 19 3. A certificate of appealability and leave to proceed in forma pauperis on  
20 appeal are **denied** because Petitioner has not made a substantial showing of  
21 the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).
- 22 4. The Clerk shall **terminate** this action.

23 Dated this 7th day of August, 2015.

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28 David G. Campbell  
United States District Judge