

1 NOT FOR PUBLICATION  
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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Bruce W Clarke,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.  
14

No. CV-14-01810-PHX-JJT

**ORDER**

15 **THIS MATTER** is before the Court upon Magistrate Judge Bridget S. Bade's  
16 Report and Recommendation (Doc. 18), to which Petitioner timely filed Objections  
17 (Doc. 22). The Court has considered the Petition for Writ of Habeas Corpus (Doc. 5), the  
18 Response thereto (Doc. 14), Petitioner's Reply in support (Doc. 15), the R&R and the  
19 Objections. For the reasons stated in the R&R, the Court will deny the Petition. The  
20 Court concludes that Magistrate Judge Bade correctly identified the relevant law with  
21 respect to each of Petitioner's purported challenges, exhaustively analyzing each of those  
22 challenges in light of that law. The Court therefore adopts in whole the reasoning of the  
23 R&R as its justification for denying the Petition. Petitioner raises three objections to the  
24 R&R, all of which the Court finds unavailing, as set forth below.

25 Petitioner's Claim One (a), as Judge Bade denominates it, asserts the indictment  
26 was flawed and therefore that the trial court lacked jurisdiction over the criminal trial.  
27 Judge Bade is correct in concluding the claim is procedurally barred from federal habeas  
28 corpus review. Petitioner failed to challenge the indictment or the trial court's jurisdiction

1 either at trial or on direct appeal. Thus both the trial court in evaluating the petition for  
2 post-conviction relief and the Arizona Court of Appeals in reviewing the trial court's  
3 denial of that relief correctly applied Arizona Rule of Criminal Procedure 32.2(a)(3)'s  
4 procedural bar. That procedural bar constitutes an adequate and independent state  
5 procedural ground to deny review of Petitioner's first claim. Federal habeas review is  
6 procedurally barred and properly denied.

7 Petitioner does not appear to directly argue against the above. Rather, he objects  
8 that when the Arizona Supreme Court denied his petition to review the Arizona Court of  
9 Appeals' denial of post-conviction relief, it violated the Due Process and Equal  
10 Protection Clauses of the Constitution. Judge Bade identified this challenge as Claim One  
11 (b) and noted that Petitioner did not present this claim to the state courts, which renders it  
12 unexhausted. Judge Bade correctly noted that, rather than dismissing the petition for  
13 containing a mix of exhausted and unexhausted claims, the Court can evaluate the  
14 unexhausted claim on the merits and deny it if it has no merit, pursuant to 28 U.S.C.  
15 Section 2254(b)(2). Upon evaluation of Claim One (b) on the merits, it fails. The Equal  
16 Protection claim Petitioner advances fails as conclusory and unsupported, as Judge Bade  
17 set forth. Similarly, Petitioner's Due Process claim is unsupported in law. Petitioner  
18 asserts that the Arizona Supreme Court was required to consider the merits of his claims  
19 because they challenged the trial court's jurisdiction over his criminal trial based on an  
20 allegedly flawed indictment. Contrary to Petitioner's claims, the Arizona Supreme Court  
21 was not so required. As set forth in great detail in the R&R, Arizona law provides that  
22 review by the Arizona Supreme Court is discretionary except in capital cases, which this  
23 is not. None of the cases Petitioner cites changes that legal conclusion; nor do those cases  
24 establish the proposition that Petitioner had a liberty interest in the Arizona Supreme  
25 Court granting his petition for review of denial of post-conviction relief.

26 In his objection, Petitioner cites an out-of-circuit opinion for the general  
27 proposition that "when dismissal of a pro se complaint is warranted, it should generally  
28 be without prejudice to afford plaintiff opportunity to file an amended complaint." *Good*

1 v. *Allain*, 823 F.2d 64,67 (5th Cir. 1987). This Court has no quarrel with the above  
2 general proposition. But it recognizes that the proposition is qualified such that when  
3 amendment would be futile because as a matter of law, the defect cannot be cured by  
4 amendment, there is no purpose in, and therefore no requirement for, allowing  
5 amendment. *Intri-Plex Techs. v. Crest Group, Inc.*, 499 F.3d 1048, 1056 (9th  
6 Cir.2007)(dismissal without leave to amend is proper if it is clear that “the complaint  
7 could not be saved by any amendment.”) Such is the case here. Petitioner repeatedly  
8 argues past the indisputable legal conclusion that, as stated above, Rule 32.2 presents an  
9 adequate and independent procedural bar to the claim he now wishes to make. That  
10 procedural bar makes any amendment regarding this claim futile.

11 Petitioner’s next claim for relief, denominated Claim Two in the R&R, is that the  
12 trial court, in imposing duplicative and consecutive sentences, violated the Due Process  
13 and Equal Protection Clauses of the Constitution of the United States. This claim was not  
14 presented to the Arizona State courts either on direct appeal or on post-conviction review,  
15 and as such is unexhausted but procedurally barred. Rule 32 again provides that where a  
16 claim could have been raised at trial, on direct appeal, or in a prior post-conviction  
17 proceeding, but was not, it is untimely, and thus precluded from review.

18 In his Objections, Petitioner again urges it was error for the Arizona Supreme  
19 Court to deny him the opportunity to return to the lower courts on this issue to exhaust  
20 this claim. The Court’s response to this objection is the same as to the last: Petitioner has  
21 no right to Supreme Court review in a noncapital matter. Magistrate Judge Bade  
22 correctly concluded the claim is procedurally barred, and Petitioner has offered no basis  
23 to overcome the procedural bar, having failed to make a showing that there was any  
24 fundamental miscarriage of justice, cause, or prejudice.

25 Finally, in Claim Three, Petitioner raises what appears to be an independent claim  
26 of a miscarriage of justice. Judge Bade correctly concluded that any such claim is  
27 procedurally barred in this instance, because Petitioner did not present it to the state  
28 courts on direct appeal or for post-conviction review. Moreover, to establish the existence

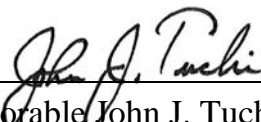
1 of a fundamental miscarriage of justice, a petitioner must present new, reliable evidence  
2 that was not presented at trial, such as exculpatory scientific evidence, trustworthy  
3 eyewitness accounts, or critical physical evidence. The petitioner must then demonstrate  
4 that “it is more likely than not that no reasonable juror would have convicted him in light  
5 of the new evidence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Petitioner has produced  
6 none of the above. Nor has he demonstrated “cause” – a showing that some objective  
7 factor external to the defense impeded his efforts to comply with the state’s procedural  
8 rules – or “prejudice” – actual harm resulting from the constitutional violation or error.  
9 Once again, Petitioner attempts to rely on the Arizona Supreme Court’s denial of his  
10 motion to dismiss his petition to demonstrate cause and prejudice, claiming that this  
11 denial kept him from exhausting his claims. Petitioner’s argument fails. Again, this is a  
12 noncapital case, so to properly exhaust his claims, petitioner was not required to present  
13 them to the Arizona Supreme Court.

14 **IT IS ORDERED** accepting, adopting and incorporating by reference Magistrate  
15 Judge Bade’s Report and Recommendation in this matter and the analysis contained  
16 therein (Doc. 18).

17 **IT IS FURTHER ORDERED** denying the Petition for a writ of habeas corpus  
18 (Doc. 5) for the reasons set forth above and in more detail in the incorporated Report and  
19 Recommendation.

20 **IT IS FURTHER ORDERED** denying a Certificate of Appealability because  
21 Petitioner has not made a substantial showing of the denial of a constitutional right.

22 Dated this 30th day of June, 2015.

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25   
26 Honorable John J. Tuchi  
27 United States District Judge  
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