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## IN THE UNITED STATES DISTRICT COURT

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## FOR THE DISTRICT OF ARIZONA

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9 James Joseph Zanzot,

No. CV-15-00485-PHX-DJH

10 Petitioner,

**ORDER**

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

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15 This matter is before the Court on Petitioner's Petition for Writ of Habeas Corpus  
16 pursuant to 28 U.S.C. § 2254 (Doc. 1) and the Report and Recommendation ("R&R")  
17 issued by United States Magistrate Michelle H. Burns (Doc. 27). Petitioner has filed an  
18 Objection to the Report and Recommendation (Doc. 31). Respondents have not filed a  
19 response to Petitioner's Objection.

20 Petitioner raises four grounds for relief in the Petition. In Ground One, Petitioner  
21 alleges that the State breached the plea agreement he entered in violation of the Fifth and  
22 Fourteenth Amendments. In Ground Two, Petitioner alleges prosecutorial misconduct in  
23 violation of the Fifth and Fourteenth Amendments. Petitioner alleges in Ground Three  
24 that his attorney at sentencing provided ineffective assistance of counsel by failing to  
25 object to the imposition of aggravated and consecutive sentences. Finally, in Ground  
26 Four, Petitioner alleges that the trial court erred when it imposed an aggravated sentence.  
27 After a thorough analysis, the Magistrate Judge determined that Petitioner's claims are  
28 procedurally defaulted and that he failed to present any valid reasons to excuse his

1 procedural defaults. Accordingly, the Magistrate Judge recommends the Petition be  
2 denied and dismissed with prejudice. (Doc. 27 at 12).

### 3 **I. Background**

4 Pursuant to a plea agreement dated March 19, 2009, Petitioner pled guilty to one  
5 count of burglary in the third degree with sexual motivation, a class four felony under  
6 Arizona law, with a prior felony conviction. (Doc. 16-1 at 12). He also pled guilty to  
7 two counts of voyeurism, class five felonies. (*Id.*). At the sentencing hearing on October  
8 30, 2009, Petitioner was sentenced to a total of 12.5 years in prison, which included 7.5  
9 years on the burglary count, plus two consecutive 2.5 year terms on the voyeurism  
10 counts. (Doc. 16-1 at 21-23). The R&R summarizes the procedural background of the  
11 case, including Petitioner's request for post-conviction relief and for appellate review.  
12 (Doc. 27 at 1-3). The Court therefore finds it unnecessary to repeat the same information  
13 here. Moreover, Petitioner has not objected to the information in the background section.  
14 *See Thomas v. Arn*, 474 U.S. 140, 149 (1989) (The relevant provision of the Federal  
15 Magistrates Act, 28 U.S.C. § 636(b)(1)(C), "does not on its face require any review at all  
16 . . . of any issue that is not the subject of an objection.").

### 17 **II. Analysis**

18 The district judge "shall make a de novo determination of those portions of the  
19 report or specified proposed findings or recommendations to which objection is made."  
20 28 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) ("The district judge must  
21 determine de novo any part of the magistrate judge's disposition that has been properly  
22 objected to."); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (same). The judge "may  
23 accept, reject, or modify, in whole or in part, the findings or recommendations made by  
24 the magistrate judge." 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P. 72(b)(3).

25 A comprehensive summary of the legal standards governing exhaustion of state  
26 court remedies and procedural default is provided in the R&R (Doc. 27 at 4-8). Because  
27 Petitioner does not object to the legal standards set forth in the R&R, this Court relies on  
28 those standards for its analysis.

1 As referenced in the R&R, a petitioner must exhaust his remedies in state court  
2 before filing a habeas petition in federal court. See 28 U.S.C. § 2254(b)(1) and (c). To  
3 exhaust state court remedies in Arizona, a petitioner must fairly present his claims to the  
4 Arizona Court of Appeals either through the state’s direct appeal process or through post-  
5 conviction relief. See *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999).

6 “In order to ‘fairly present’ an issue to a state court, a petitioner must ‘present the  
7 substance of his claim to the state courts, including a reference to a federal constitutional  
8 guarantee and a statement of facts that entitle the petitioner to relief.’” *Gulbrandson v.*  
9 *Ryan*, 738 F.3d 976, 992 (9th Cir. 2013) (quoting *Scott v. Schriro*, 567 F.3d 573, 582 (9th  
10 Cir. 2009)); see also *Tamalini v. Stewart*, 249 F.3d 895, 898-99 (9th Cir. 2001) (finding  
11 the petitioner failed to fairly present his federal claims to the state court because he did  
12 not describe the operative facts and federal legal theory upon which his claims were  
13 based) (citations omitted). Proper exhaustion requires a petitioner to have “fairly  
14 presented” to the state courts the exact federal claim he raises on habeas by describing the  
15 operative facts and federal legal theory on which the claim is based. See *Picard v.*  
16 *Connor*, 404 U.S. 270, 275-278 (1971). “Our rule is that a state prisoner has not ‘fairly  
17 presented’ (and thus exhausted) his federal claims in state court unless he specifically  
18 indicated to that court that those claims were based on federal law.” *Lyons v. Crawford*,  
19 232 F.3d 666, 668 (9th Cir. 2000), *amended on other grounds*, 247 F.3d 904 (9th Cir.  
20 2001). “If a petitioner fails to alert the state court to the fact that he is raising a federal  
21 constitutional claim, his federal claim is unexhausted regardless of its similarity to the  
22 issues raised in state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

23 In this case, the Arizona Court of Appeals determined that Petitioner had properly  
24 presented only two claims in his petition for review following the denial of his petition  
25 for post-conviction relief, the first of which was a direct challenge to the grand jury  
26 proceedings and the second of which was a claim that the trial court erred in considering  
27 Petitioner’s prior conviction as an aggravating factor for sentencing purposes. Neither of  
28 these claims is raised in Petitioner’s habeas petition. Thus, because none of Petitioner’s

1 federal habeas claims are the same as the claims he raised in his petition for review in the  
2 Arizona Court of Appeals, his habeas claims have not been properly exhausted.  
3 Moreover, returning to the state court to properly exhaust the claims at this stage would  
4 be futile.<sup>1</sup> Petitioner’s claims are, therefore, procedurally defaulted.

5 With regard to Ground One, Petitioner objects to the Magistrate Judge’s  
6 procedural default determination by arguing that the Arizona Court of Appeals was  
7 required to review the entire record for fundamental and legal errors. (Doc. 31 at 3). In  
8 addition, Petitioner argues that the Court of Appeals was required to not only consider the  
9 claims presented in that court but also consider the claims presented in the initial petition  
10 for post-conviction relief in the trial court. Petitioner’s argument, however, would render  
11 the exhaustion requirement meaningless. It was Petitioner’s responsibility to present his  
12 habeas claims first to the trial court in his petition for post-conviction relief and then to  
13 the Arizona Court of Appeals. Petitioner was required to first provide the state courts a  
14 full and fair opportunity to address his claims before presenting them in a habeas petition.  
15 The claim he raises here in Ground One, that the prosecution breached the plea  
16 agreement by alleging as an aggravating factor at sentencing that Petitioner committed  
17 the offenses while on probation, was not fairly presented to both the trial court and to the  
18 Arizona Court of Appeals. The claim is therefore procedurally defaulted and Petitioner  
19 has not demonstrated cause and prejudice or a fundamental miscarriage of justice that  
20 would excuse the procedural default.

21 Regarding Ground Two, in which Petitioner alleges the prosecutor engaged in  
22 misconduct during the grand jury proceedings, Petitioner claims he argued this claim  
23 “either in a direct or indirect manner” in the state trial court and at the Court of Appeals.  
24 (Doc. 31 at 6). He concedes, however, that his petition for review in the Court of

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26 <sup>1</sup> Arizona Rule of Criminal Procedure 32.2(a) provides that a defendant is  
27 precluded from post-conviction relief on any ground that could have been raised on direct  
28 appeal or that was decided in a prior post-conviction petition. In addition, the time has  
passed to seek post-conviction relief in the State court under Rule 32.4(a) of the Arizona  
Rules of Criminal Procedure and Petitioner has not shown any of the exceptions to the  
time limits identified in Arizona Rules of Criminal Procedure 32.1(d), (e), (f), (g) or (h)  
apply to him.

1 Appeals “lacked articulation of these specific claims” of prosecutorial misconduct. (*Id.*).  
2 Despite acknowledging that his petition in the Arizona Court of Appeals did not present  
3 the same prosecutorial misconduct claim that is presented here in his habeas petition, he  
4 claims that he satisfied the exhaustion requirement and his claim is not procedurally  
5 defaulted. The Court disagrees. As the above referenced legal authority establishes, to  
6 fairly present a claim in state court, a petitioner must have described the same operative  
7 facts and federal legal theory upon which his habeas claim is based. As Petitioner  
8 concedes, he failed to do so here. Ground Two is therefore procedurally defaulted and  
9 Petitioner has not made the requisite showing to excuse the procedural default.

10 Petitioner alleges in Ground Three that he received ineffective assistance of  
11 counsel when his lawyer at sentencing failed to object when the trial court used  
12 Petitioner’s probation status as an aggravating factor. Petitioner claims that pursuant to  
13 his plea agreement, his probation status at the time of the offense could not be used to  
14 increase his sentence. Petitioner, however, did not present this specific ineffective  
15 assistance claim to the Arizona Court of Appeals in his petition for review. (Doc. 16-2 at  
16 5-11). Petitioner therefore failed to exhaust his state court remedies.

17 Petitioner contends that he did “touch on” this argument in both the trial court and  
18 in the Court of Appeals. (Doc. 31 at 8). He contends that by reading all the documents  
19 from the post-conviction relief proceedings, the Court should conclude that Petitioner  
20 attempted to present this claim. Petitioner contends that “the grounds for which counsel  
21 should have objected to these aggravated consecutive sentences were based on the only  
22 obvious reasons cited in the sentencing transcripts” and the plea agreement. (Doc. 31 at  
23 8). Thus, Petitioner is essentially arguing that it is the Court’s obligation to discern what  
24 his intended claims were in state court by reviewing the complete record, rather than rely  
25 on the claims he specifically identified in his post-conviction petition and petition for  
26 review. However, as the above cited authority indicates, the obligation to clearly identify  
27 his claims rests with Petitioner. Petitioner’s ineffective assistance claim in the petition  
28 for review to the Arizona Court of Appeals failed to mention anything about counsel’s

1 failure to object to the trial court's use of his probation status as an aggravating factor.  
2 Because Petitioner failed to present this claim to the Arizona Court of Appeals, the claim  
3 has not been exhausted. As noted above, returning to the state court to properly exhaust  
4 the claims at this stage would be futile. The claim is therefore procedurally defaulted and  
5 Petitioner has not demonstrated cause and prejudice or a fundamental miscarriage of  
6 justice that would excuse the procedural default.

7 Lastly, with regard to Ground Four, Petitioner alleges the trial court erred at the  
8 sentencing hearing by considering his probation status even though the plea agreement  
9 dismissed the allegation that he was on probation at the time of the offense. He further  
10 claims the trial court erred by imposing aggravated and consecutive sentences on the  
11 voyeurism counts after Petitioner declined lifetime probation on those counts. Petitioner  
12 also claims the Court erred by requiring him to register as a sex offender.

13 As referenced above, the Arizona Court of Appeals concluded that the petition for  
14 review properly presented only two issues, a challenge to the grand jury proceedings and  
15 a claim that the trial court could not consider his prior convictions as an aggravating  
16 factor at sentencing. (Doc. 16-2 at 38). The Court of Appeals further explained:

17 While Zanzot presents many other issues in his petition for  
18 review, he did not raise those same issues in the petition for  
19 post-conviction relief he filed below. While some of these  
20 issues may be similar to the issues presented below, Zanzot  
21 presents these issues in new contexts he did not present below  
22 and/or supports these issues with new arguments he did not  
23 present below. A petition for review may not present issues  
24 and arguments not first presented to the trial court. [citations  
25 omitted]

26 (Doc. 16-2 at 138). Because Petitioner's claim in Ground Four is not among those  
27 identified by the Arizona Court of Appeals as properly presented in the petition for  
28 review, the claim in Ground Four has not been exhausted. Petitioner presents nothing in  
his Objection (Doc. 31) to persuade the Court otherwise. The claim is therefore  
procedurally defaulted and Petitioner has not demonstrated cause and prejudice or a  
fundamental miscarriage of justice that would excuse the procedural default.

1 **III. Conclusion**

2 For the foregoing reasons, and after conducting a *de novo* review of the Magistrate  
3 Judge's procedural default determinations, the Court agrees with the Magistrate Judge  
4 and concludes that Petitioner's grounds for relief are procedurally defaulted.

5 Accordingly,

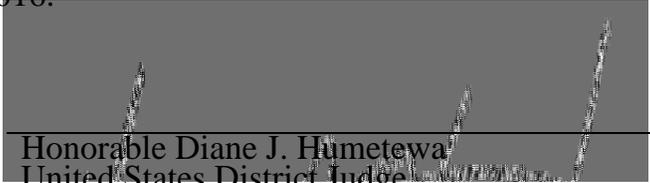
6 **IT IS ORDERED** that Magistrate Judge Burns' R&R (Doc. 27) is **accepted** and  
7 **adopted**. Petitioner's Objections (Doc. 31) are overruled.

8 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus  
9 pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied** and **dismissed with prejudice**.

10 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing  
11 Section 2254 Cases, a Certificate of Appealability and leave to proceed *in forma pauperis*  
12 on appeal are **denied** because dismissal of the Petition is justified by a plain procedural  
13 bar and jurists of reason would not find the procedural ruling debatable.

14 **IT IS FINALLY ORDERED** that the Clerk of Court shall terminate this action  
15 and enter judgment accordingly.

16 **Dated** this 16th day of November, 2016.

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Honorable Diane J. Humetewa  
United States District Judge