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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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| Adam Arthur Borja, |) | No. CV-15-00551-PHX-SPL |
| |) | |
| Petitioner, |) | ORDER |
| vs. |) | |
| |) | |
| Charles L. Ryan, et al., |) | |
| |) | |
| Respondents. |) | |

Before the Court are Petitioner Adam Arthur Borja’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and Motion to Dismiss (Doc. 22). The Honorable Bridget S. Bade, United States Magistrate Judge, has issued a Report and Recommendation (“R&R”) (Doc. 27), recommending that the petition and motion be denied. Petitioner has objected the R&R. (Doc. 28). For the reasons that follow, the Court accepts and adopts the R&R, and denies the petition and motion.

I. Background

On August 7, 2006, Petitioner was indicted on one count of first-degree murder, one count of first-degree burglary, and one count of arson of an occupied structure in the Maricopa County Superior Court, Case No. CR2006-145356. (Doc. 9-1, Exh. A.) Petitioner was found guilty by a jury on all charges. (Doc. 9-1, Exh. C.) On April 9, 2008, Petitioner was sentenced to concurrent terms of imprisonment, the longest of which was life without the possibility of parole until Petitioner has served twenty-five years. (Doc. 9-1, Exhs. B, D.)

1 Petitioner timely filed a notice of appeal (Doc. 9-1, Exh. E), and appellate counsel
2 filed an opening brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that
3 she had searched the record on appeal and found no question of law that was not
4 frivolous (Doc. 9-1, Exh. F). Petitioner was permitted to file a supplemental brief *in*
5 *propria persona*, but he did not do so. (Doc. 9-1, Exhs. B, G.) The Arizona Court of
6 Appeals then searched the record for fundamental error, and affirmed Petitioner’s
7 convictions and sentences. (Doc. 9-1, Exh. B); *State v. Borja*, 2009 WL 1563491, at *2
8 (Ariz. Ct. App. 2009).

9 Petitioner timely initiated post-conviction relief proceedings pursuant to Rule 32
10 of the Arizona Rules of Criminal Procedure. Appointed counsel filed a notice with the
11 trial court stating that he was unable to find any colorable issue or claim to raise in the
12 proceeding. Petitioner filed a *pro se* petition in which he raised several claims, which
13 were denied. Petitioner sought appellate review, asking the court to review the brief he
14 previously filed with the trial court in its entirety. (Doc. 9-5, Exhs. M, N.) The appellate
15 court denied relief on January 28, 2014. (Doc. 9-5, Ex. N); *State v. Borja*, 2014 WL
16 325315, at *1 (Ariz. Ct. App. 2014). On May 21, 2014, the Arizona Supreme Court
17 summarily denied review. (Doc. 9-5, Exh. O.)

18 On March 27, 2015, Petitioner filed a timely federal habeas petition in this Court,
19 raising forty-six grounds for relief.¹ (Docs. 1, 1-1.) Respondents filed a limited answer
20 (Doc. 9) arguing that Petitioner’s claims are procedurally barred from review. Petitioner
21 did not file a reply, and instead filed a motion to dismiss his petition without prejudice, or
22 to stay this proceeding and hold his petition in abeyance while he presents his claims in
23 state court. (Doc. 22.) Respondents filed a response opposing the motion (Doc. 24), to
24 which Petitioner filed a reply and a “supplemental exhibit” (Docs. 25, 26). Following
25 review, the Magistrate Judge found Petitioner’s claims to be procedurally barred, and
26 recommended that the petition and the motion be denied. (Doc. 27.)

27 ¹ Petitioner does not object to the R&R’s recitation of the forty-six claims raised in
28 the petition, which the Court adopts and incorporates here by reference. (*See* Doc. 27 at
4-8.)

1 **II. Standard of Review**

2 A district judge “may accept, reject, or modify, in whole or in part, the findings or
3 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). When a party files
4 a timely objection to an R&R, the district judge reviews *de novo* those portions of the
5 R&R that have been “properly objected to.” Fed. R. Civ. P. 72(b). A proper objection
6 requires specific written objections to the findings and recommendations in the R&R. *See*
7 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. §
8 636(b)(1). It follows that the Court need not conduct any review of portions to which no
9 specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas*
10 *v. Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is
11 judicial economy). Further, a petitioner is not entitled as of right to *de novo* review of
12 evidence or arguments which are raised for the first time in an objection to the R&R, and
13 the Court’s decision to consider them is discretionary. *United States v. Howell*, 231 F.3d
14 615, 621-622 (9th Cir. 2000).

15 **III. Discussion**

16 **A. Petition**

17 Petitioner objects to the R&R’s finding that his claims are procedurally barred on
18 the basis that, despite having properly presented his claims, the state court erroneously
19 rejected his claims on procedural grounds. (Doc. 28 at 28.) This objection is without
20 merit.²

21 First, Petitioner’s trial error claims are procedurally defaulted. As addressed in the
22 R&R, Petitioner did not present *any* claim on direct review. On direct appeal, appellate
23 counsel filed an *Anders* brief, and although Petitioner had the opportunity to file a
24 supplemental brief, he did not do so. (Doc. 9-1, Exh. B.) Petitioner subsequently
25 presented a series of claims to the trial court in his post-conviction relief proceeding.

26 _____
27 ² In making this argument, Petitioner relies on *James v. Ryan*, 679 F.3d 780, 802
28 (9th Cir. 2012). Although it is distinguishable from this case, the Court need not address
it here because it was vacated by the Supreme Court in *Ryan v. James*, 133 S.Ct. 1579
(2013).

1 (Docs. 9-2, 9-3, 9-4.) However, because the claims of trial error could have been raised
2 on direct appeal but were not, both the trial and appellate court found them to be
3 precluded from review by Ariz. R. Crim. P. 32.2(a)(3) - an adequate and independent
4 state procedural ground. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Jones v.*
5 *Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012); *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir.
6 2014) (“Arizona’s waiver rules are independent and adequate bases for denying relief”).

7 Petitioner’s claims of ineffective assistance of *trial* counsel are also procedurally
8 defaulted. (*See* Docs. 1 and 1-1, Claims 2, 3, 10, 12, 18, 20, 24, 30, 33, 36, 37, 39.) As
9 addressed in the R&R, the appellate court found that because Petitioner could not have
10 presented any claims of ineffective assistance of counsel on direct appeal, the trial court
11 had incorrectly ruled that his ineffective assistance of counsel claim was also precluded
12 from post-conviction review. (Doc. 27 at 11, fn. 5; Doc. 9-5, Exh. N.) The appellate court
13 found however, that Petitioner had not specifically raised a claim of ineffective assistance
14 of trial counsel in his petition for review. Instead, Petitioner had simply asked the
15 appellate court to consider “all the issues presented in the Rule 32 pro se brief.” (Doc. 9-
16 5, Exhs. M,N.) Consequently, it concluded that Petitioner had waived review of any
17 claim of ineffective assistance of trial counsel because he did not sufficiently raise it on
18 appeal in accordance with Ariz. R. Crim. P. 32.9(c)(1). (Doc. 9-5, Exh. N.) Therefore,
19 while Petitioner may have properly presented his ineffective assistance of trial counsel
20 claim(s) to the trial court, those claims are procedurally defaulted because they were
21 precluded from review by the appellate court on an adequate and independent state
22 procedural ground under Ariz. R. Crim. P. 32.2(a)(3) and 32.9(c).

23 The Court further agrees with the R&R’s conclusion that Petitioner’s ineffective
24 assistance of *appellate* counsel claim (Doc. 1-1, Claim 45) was not presented to the state
25 court and is barred from review. Although the facts presented in state court bare
26 similarity to those contained in his habeas petition, Petitioner did not fairly present a
27 Sixth Amendment ineffective assistance of appellate counsel claim in state court. *See*
28 *Gulbrandson v. Ryan*, 738 F.3d 976, 992 (9th Cir. 2013); *Tamalini v. Stewart*, 249 F.3d

1 895, 898 (9th Cir. 2001). Contrary to his objection (Doc. 28 at 28-29), Petitioner did not
2 raise his federal claim in his reply brief during his post-conviction relief proceeding. In
3 response to the state’s argument to the trial court that his claims were precluded from
4 review, Petitioner replied that “[a]ny failure to raise [his] claims during the 2008 trial on
5 the 2009 direct appeal is a result of the attorney mishandling Mr. Borja’s case at those
6 times. Mr. Borja has the right to competent legal representation.” (Doc. 9-5, Exh. K.) He
7 did not point to any federal constitutional guarantee underlying his claim, give any
8 application to his facts under federal law, nor did he even specifically claim “ineffective
9 assistance of appellate counsel.” Similarly, on appeal, Petitioner only argued that he “did
10 not knowingly []or willingly waive the issues presented in the Rule 32 pro se brief”
11 because his appellate attorney had informed him he was not required to file a
12 supplemental brief after she had filed an *Anders* brief.” (Doc. 9-5, Exh. M.) *See also State*
13 *v. Borja*, 2014 WL 325315, at *1 (Ariz. Ct. App. 2014) (“On review, Borja contends he
14 was not to blame for his failure to raise on appeal the issues presented in his Rule 32
15 proceeding, asserting the failure arose from appellate counsel’s communications with
16 him”); (Doc. 9-5, Exh. N). In presenting this argument, Petitioner did not cite any legal
17 authority or specific constitutional guarantee, or otherwise alerted the appellate court to
18 the fact that he was asserting a federal claim. Petitioner’s recharacterization of his claim
19 in his federal habeas petition does not transform the claim that was presented in state
20 court.

21 As addressed in the R&R, a return to further pursue his claims would be futile and
22 as a result, his claims are procedurally defaulted and barred from federal habeas review.
23 The time has passed to seek post-conviction relief in state court under Ariz. R. Crim. P.
24 32.4(a), and his claims would be precluded from review under Ariz. R. Crim. P. 32.2
25 because they could have been raised on direct appeal or in Petitioner’s prior post-
26 conviction proceeding. The R&R discussed that Petitioner has not shown that he satisfies
27 any of the exceptions to the timeliness or preclusion rules. *See* Ariz. R. Crim. P. 32.4(a)
28 and 32.2(b) (citing the exceptions listed in Ariz. R. Crim. P. 32.1). Petitioner does not

1 seek to present any new evidence or law, nor does he raise a claim of actual innocence.
2 *See* Ariz. R. Crim. P. 32.1(e), (g), (h). The appellate court has already determined that
3 review of an untimely or successive petition for post-conviction review would not be
4 permitted due to Petitioner’s allegation that his failure to previously raise his claims on
5 direct appeal was due to the fault of appellate counsel. (Doc. 9-5, Exh. N); *see* Ariz. R.
6 Crim. P. 32.1(f). Appellate counsel explained to Petitioner that she found no arguable
7 issue to present on appeal and filed an *Anders* brief, and that Petitioner was permitted to
8 file a supplemental brief should he wish to do so. (Id.) Petitioner objects by contending
9 that his previously filed brief “states the specific exception to each and every ground...
10 which satisfies the requirements under Arizona law which allow Borja to file a successive
11 untimely petition for P.C.R.” (Doc. 28 at 30.) However, Petitioner does not point to any
12 specific flaw in the R&R’s analysis or findings, and instead, offers only a general
13 objection by referencing his prior filing. This objection is therefore rejected.

14 Further, the Court agrees with the R&R that Petitioner does not establish “cause
15 and prejudice” to excuse the procedural default of his claims, nor does he argue that
16 failure to consider his claims would result in a “fundamental miscarriage of justice.” *See*
17 *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (discussing “cause” and “prejudice”)
18 *overruled on other grounds by Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Schlup v. Delo*,
19 513 U.S. 298, 327 (1995) (discussing “fundamental miscarriage of justice”). Petitioner
20 does not object to the R&R on this basis. Rather, Petitioner specifically responds that
21 “[i]n regards to presenting arguments to overcome any procedural bar, Borja’s position
22 and arguments are that there is no bar to the federal review of his habeas claims at this
23 time so it would [be] inappropriate to present argument to overcome [the] procedural bar
24 because he would be conceding that his habeas claims are in fact procedurally barred and
25 contradicting the arguments contained in his briefs thus far.” (Doc. 28 at 31.) Petitioner’s
26 belief that his claims are not procedurally barred does not relieve him of his burden to
27 show, even in the alternative, that the procedural default of his claims should be excused.
28 Therefore, having failed to establish a basis to excuse the procedural default of his

1 claims, the Court finds that they are procedurally barred from federal habeas review.

2 **B. Motion**

3 Lastly, Petitioner requests that his petition be dismissed without prejudice, or in
4 the alternative, that this action be stayed so that his timely habeas petition can be held in
5 abeyance while he attempts to present his unexhausted federal claims in state court. (Doc.
6 22.) The Court agrees with R&R’s recommendation that this request should be denied,
7 and overrules Petitioner’s objection arguing the contrary.

8 Here, dismissing the petition without prejudice would be futile. As previously
9 discussed, Arizona law would preclude a successive petition for post-conviction review.
10 For the same reason, the stay and abeyance procedure is not appropriate under these
11 circumstances. A district court has limited discretion to stay and hold in abeyance a
12 federal habeas petition containing an unexhausted claim so that the petitioner may return
13 to state court to exhaust it. *See Rhines v. Weber*, 544 U.S. 269, 276-77 (2005); *Mena v.*
14 *Long*, 813 F.3d 907, 912 (9th Cir. 2016). Here, all of Petitioner’s claims are procedurally
15 barred from review and Petitioner no longer has state remedies available to consider his
16 claims. *See Cassett v. Stewart*, 406 F.3d 614, 621, n.5 (9th Cir. 2001). The Court will
17 therefore adopt the R&R’s recommendation and deny the motion.

18 **IV. Conclusion**

19 Having reviewed the record as a whole, and finding none of Petitioner’s objections
20 have merit, the R&R will be adopted in full. For the reasons addressed above, Petitioner’s
21 claims are procedurally barred from federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(a)
22 (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to
23 the judgment of a State court shall not be granted unless it appears that... the applicant
24 has exhausted the remedies available in the courts of the State.”). Dismissal of the
25 petition with prejudice is warranted. Accordingly,

26 **IT IS ORDERED:**

27 1. That Magistrate Judge Bade’s Report and Recommendation (Doc. 27) is
28 **accepted** and **adopted** by the Court;

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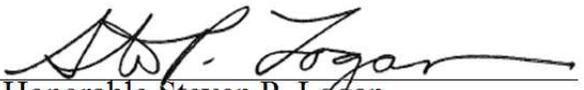
2. That the Motion to Dismiss/Stay (Doc. 22) is **denied**;

3. That the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied** and this action is **dismissed with prejudice**;

4. That a certificate of appealability and leave to proceed *in forma pauperis* on appeal are **denied** because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable; and

5. That the Clerk of Court shall **terminate** this action.

Dated this 19th day of September, 2016.


Honorable Steven P. Logan
United States District Judge