

1 court before they can be reviewed in federal court on a Habeas Petition. He instead
2 suggests that he was not required to obtain state court review of his claims in order for
3 him to obtain federal review because the ultimate responsibility for deciding what claims
4 to review rests with the state. Petitioner is wrong. Title 28 U.S.C. § 2254(b)(1)(A) and (c)
5 plainly require that a state prisoner must properly exhaust all state court remedies before
6 a federal court can grant a Petition for Writ of Habeas Corpus. The responsibility for
7 presenting the claims does not rest with the state but with Petitioner. The Court agrees
8 with the Magistrate Judge that Petitioner failed to exhaust and is, therefore, procedurally
9 barred from federal review of those claims. Therefore, this Court cannot review Grounds
10 Five, Six, Seven, Eight, Ten and Eleven in the Petition for the reasons fully explained by
11 the Magistrate Judge in his Report and Recommendation.

12 Petitioner also objects to the Magistrate Judge's conclusion that he failed to
13 demonstrate either cause for the default and actual prejudice to excuse the default or a
14 miscarriage of justice as to these unexhausted claims. Petitioner devotes 12 pages of his
15 objections to the issue of cause and prejudice but, again attempts to place the burden on
16 the Respondents and the Magistrate Judge. It is Petitioner's burden to demonstrate cause
17 for the default and actual prejudice to excuse the default or a miscarriage of justice.
18 Nothing in his Petition, Reply or Objection makes this showing.

19 The grounds of Prosecutorial Misconduct (Ground Two), Ineffective Assistance
20 of Trial and Appellate Counsel (Grounds Three and Four), and Sixth Amendment Right
21 to Self- Representation (Grounds One and Nine) were properly exhausted and reviewed
22 on the merits by the Magistrate Judge in his Report and Recommendation.

23 The claim for prosecutorial misconduct raised in Ground Two is that the
24 prosecutor misstated information about a testifying co-defendant's plea deal and his prior
25 convictions in order to bolster his credibility with the jury. The Magistrate Judge properly
26 noted that the standard for reviewing this claim is whether the prosecutor's comments so
27 infected the trial with unfairness as to make the conviction a denial of due process. The
28 Magistrate Judge found that even assuming the prosecutor's remarks were improper,

1 these remarks did not rise to the level of infecting the trial with unfairness. The
2 Magistrate Judge noted that any inference the jury might draw from the prosecutor's
3 description of the plea deal was more than balanced by the lengthy and detailed cross-
4 examination of this witness by Petitioner's lawyer, which included questioning about the
5 plea agreement and the consequences thereof. The Magistrate Judge concluded that
6 Petitioner is not entitled to habeas relief on the claim of prosecutorial misconduct.

7 The focus of Petitioner's objection is on the impropriety of the prosecutor's
8 remarks rather than on the effect of those remarks on the trial and the standard that the
9 remarks must have infected the trial with unfairness. Petitioner urges that the Court
10 should look at the cumulative effect of his unexhausted claims of prosecutorial
11 misconduct in Grounds Five and Ten with his claim.¹ Unexhausted Ground Five did not
12 involve a claim of prosecutorial misconduct in the presence of the jury but something that
13 happened between the court and counsel. Unexhausted Ground Ten argued that there
14 was prosecutorial misconduct by the prosecutor vouching for several of his witnesses in
15 his closing argument. Petitioner, in his objections, also provides the Court with
16 suggestions of the questions and answers the prosecutor could have asked the witness
17 rather than the ones he did.

18 The Court agrees with the Magistrate Judge that the only alleged prosecutorial
19 misconduct that can be considered by this Court is that asserted in Ground Two regarding
20 the alleged misstatement of information about his co-defendant's plea agreement and his
21 prior convictions. Petitioner's objections do not explain to the Court, in any persuasive
22 way, how these comments, even if improper, infected the trial with unfairness. The Court
23 agrees with the Magistrate Judge that Petitioner is not entitled to relief on his claim of
24 prosecutorial misconduct.

25
26 ¹ Petitioner also makes the confusing statement that this claim does not rest on federal
27 constitutional law, although the Petitioner's description of Ground Two in his Petition
28 was that this alleged prosecutorial misconduct was a denial of his rights to both due
process and a fair trial.

1 Petitioner also objected to the Magistrate Judge’s conclusion that he has failed to
2 show that his trial and/or appellate counsel were ineffective as asserted in Grounds Three
3 and Four. The Report and Recommendation correctly sets out the standard that Petitioner
4 must meet to demonstrate ineffective assistance of counsel. Petitioner must show
5 objectively deficient performance that caused him prejudice. During his state court post-
6 conviction relief proceedings, these claims were reviewed by the state court, which found
7 both competent representation and the absence of prejudice. The Court of Appeals
8 agreed. The Magistrate Judge noted that while Petitioner has claimed that counsel were
9 ineffective he failed to provide specific examples of how his trial, sentencing, or appeal
10 would have been different but for his attorneys’ actions, thereby failing to meet his
11 requirement of showing prejudice rather than merely alleging it. The Court agrees with
12 the Magistrate Judge that Petitioner is not entitled to relief on his claims that his trial
13 and/or appellate counsel were ineffective as asserted in Grounds Three and Four.

14 Petitioner also objects to the Magistrate Judge’s conclusion that he is not entitled
15 to habeas relief on his claim that the state court denied his request for self-representation
16 in violation of his rights under the Sixth Amendment. This issue was raised in
17 Petitioner’s appeal. The Court of Appeals concluded that his request for self-
18 representation was equivocal and insufficient to invoke his right to self-representation.
19 On habeas review an issue decided on the merits in state court based on factual
20 determinations, as this one was, cannot be overturned unless it is objectively
21 unreasonable in light of the evidence presented in state court. The Magistrate Judge
22 concluded that it could not be said that the Court of Appeals’ decision was objectively
23 unreasonable in deciding that the trial court reasonably concluded that Petitioner’s
24 statements about self-representation indicated that he only wanted to waive counsel for
25 the limited purpose of presenting certain motions and not for his entire case. Petitioner’s
26 objection wholly fails to address this standard and how the Court of Appeals’
27 determination was objectively unreasonable. The Court agrees with the Magistrate Judge
28 that Petitioner is not entitled to relief for his claim that the state court denied his request

1 for self-representation in violation of his rights under the Sixth Amendment as asserted in
2 Grounds One and Nine.

3 Petitioner also includes in his objections disagreement with the Magistrate Judge's
4 denial of his Motion to Expand the Record. Because this is a non-dispositive matter Rule
5 72(a), Fed.R.Civ.P establishes the standard for overturning the denial. The Magistrate
6 Judge's ruling will only be modified or set aside if clearly erroneous or contrary to law.
7 The Motion to Expand the Record included a request to include a transcript of the trial
8 management conference that had to do with a claim of ineffective assistance of counsel in
9 connection with alleged plea negotiations. The Court agrees with the Magistrate Judge
10 that Petitioner's decision to forgo a plea is not at issue in this habeas proceeding.
11 Petitioner also wished to expand the record to include the video of the pretrial hearing
12 where he submitted the lost motions. The Magistrate Judge concluded that the video was
13 not necessary because the transcript of the hearing clearly demonstrates that Petitioner
14 submitted these motions. The decision to deny the motion is neither clearly erroneous
15 nor contrary to law. Petitioner did not suggest that his second motion was improperly
16 decided.

17 **IT IS ORDERED** overruling Petitioner's Objections to the Report and
18 Recommendation of the Magistrate Judge.

19 **IT IS FURTHER ORDERED** adopting the Report and Recommendation of the
20 Magistrate Judge as the Order of this Court.

21 **IT IS FURTHER ORDERED** that Petition Under 28 U.S.C. § 2254 for a Writ of
22 Habeas Corpus by a Person in State Custody is denied and dismissed with prejudice.

23 **IT IS FURTHER ORDERED** affirming the Magistrate Judge's rulings on the
24 motions.

25 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to
26 proceed *in forma pauperis* on appeal is denied because denial of the Petition is justified
27 by a plain procedural bar and jurists of reason would not find the ruling debatable and
28 because Petitioner has not made a substantial showing of the denial of a constitutional

1 right.

2 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment accordingly.

3
4 Dated this 13th day of December, 2016.

5
6 
7 _____
8 Susan R. Bolton
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28