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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Devaughn Johnson,
Petitioner,
v.
Joseph M Arpaio, et al.,
Respondents.

No. CV-15-01499-PHX-ROS
ORDER

Petitioner filed a Petition for Writ of Habeas Corpus on August 3, 2015. (Doc. 1.) Petitioner's Amended Petition for Writ of Habeas Corpus raised three grounds for relief: (1) Petitioner was denied a fair trial when the number of jurors was reduced during trial in violation of his right to a fair jury trial; (2) Petitioner is actually innocent in light of newly discovered evidence; and (3) Petitioner was arrested without probable cause in violation of the Fourth Amendment. (Doc. 5 at 6-8.) Petitioner subsequently moved to voluntarily strike the second and third grounds for relief. (Doc. 16 at 1.)

On August 18, 2016, Magistrate Judge Michelle H. Burns issued a Report and Recommendation ("R&R") recommending this Court (1) grant Petitioner's motion to strike the second and third grounds for relief (Doc. 16) in light of Petitioner's submissions and the procedural status of these two grounds; (2) deny with prejudice Petitioner's first ground for relief based on procedural default; and (3) deny a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal. (Doc. 21 at 16.) On August 29, 2016, Petitioner objected to the Magistrate Judge's R&R with regard to

1 Petitioner’s first ground for relief. (Doc. 23.)

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). Where any party
4 has filed timely objections to the R&R, the district court’s review of the part objected to
5 must be *de novo*. *Id.* Here, Petitioner timely objected to the Magistrate Judge’s R&R
6 with regard to Petitioner’s first ground for relief. (*See* Doc. 23.) After reviewing the
7 record, the R&R, and the Petitioner’s objections, the Court will adopt the R&R and
8 supplement the R&R with the following discussion related to Petitioner’s objections.

9 **I. DISCUSSION.**

10 A state prisoner must exhaust his remedies in state court before petitioning for a
11 writ of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1), (c). Proper exhaustion
12 requires a petitioner to have fairly presented to the state court the exact federal claim by
13 describing the factual allegations and the federal legal theory upon which his habeas
14 claim is based. *See Picard v. Connor*, 404 U.S. 270, 275-78 (1971); *Duncan v. Henry*,
15 513 U.S. 364, 365-66 (1995) (“If state courts are to be given the opportunity to correct
16 alleged violations of prisoner’s federal rights, they must surely be alerted to the fact that
17 the prisoners are asserting claims under the United States Constitution.”). In the Ninth
18 Circuit, “[i]f a petitioner fails to alert the state court to the fact that he is raising a federal
19 constitutional claim, his federal claim is unexhausted regard[less] of its similarity to the
20 issues raised in state court.” *Casey v. Moore*, 386 F.3d 896, 914 (9th Cir. 2004) (citing
21 *Johnson v. Zenon*, 88 F.3d 828, 830-31 (9th Cir. 1996)); *see also Shumway v. Payne*, 223
22 F.3d 982, 987-88 (9th Cir. 2000) (finding petitioner failed to exhaust her federal claim
23 even though she previously alleged state court claims that arose from the same factual
24 basis upon which she later rested her federal claims because “mere similarity between a
25 claim of state and federal error is insufficient to establish exhaustion”).

26 **A. MAGISTRATE JUDGE’S RECOMMENDATION.**

27 After conducting a review of the record, the Magistrate Judge found Petitioner’s
28 first ground for relief was not exhausted because “Petitioner failed to raise the claim

1 alleged in Ground One as a federal constitutional claim on direct appeal – and the state
2 courts did not address it as one.” (Doc. 21 at 13.) The R&R also concluded Petitioner
3 failed to establish grounds to excuse the procedural default and never argued a
4 fundamental miscarriage of justice. (*Id.* at 12-14.)

5 **B. PETITIONER’S OBJECTIONS.**

6 Petitioner only objected to the Magistrate Judge’s exhaustion holding on two
7 bases. (Doc. 23.) First, Petitioner believed raising a structural error claim for the
8 reduction of his jury on direct appeal constituted presenting a federal error to the state
9 courts. (*Id.* at 1.) Second, Petitioner argued he exhausted his claim when he presented to
10 state court a state claim which is identical or functionally identical to a federal claim.
11 (*Id.*) The Court will address each argument in turn.

12 **1. Petitioner’s Structural Error Claim Did Not Constitute** 13 **Presenting a Federal Structural Error to the State Courts.**

14 “To raise the federal legal theory for purposes of exhaustion, a petitioner must
15 simply characterize a claim as federal in nature, by either referencing specific provisions
16 of the Constitution or citing to federal or state case law analyzing the federal
17 constitutional issue.” *Castillo v. McFadden*, 399 F.3d 993, 1005-06 (9th Cir. 2004)
18 (internal citations omitted). Here, Petitioner’s direct appeal and his requests for post-
19 conviction relief do not reference any federal constitutional provisions or federal law to
20 support his structural error argument. Although Petitioner’s objections to the Magistrate
21 Judge’s R&R cited to a Supreme Court case to support his argument that depriving him
22 of a verdict by twelve jurors constituted a federal structural error, Petitioner never
23 characterized his claim as federal in nature prior to his habeas petition. Thus, Petitioner’s
24 first basis for arguing he properly exhausted is unconvincing.

25 **2. The State Claim Argument Petitioner Presented to State Court** 26 **Is Not Identical or Functionally Identical to a Federal Claim.**

27 Petitioner’s Amended Petition for Writ of Habeas Corpus stated his first ground
28 for relief as “denial of [P]etitioner[’]s right to a fair jury trial in violation of the Sixth

1 Amendment, and the Ariz. Const. Art. II Sec[tion] 23.” (Doc. 5 at 6.) Although
2 Petitioner alleged in his objections that he raised the violation as a Sixth Amendment
3 issue in addition to a violation under the Arizona state constitution, the record indicates
4 he only raised the issue as a violation under state law. (Doc 13-3 at 11.) And in order for
5 Petitioner to have fairly presented his first ground for relief, Petitioner must have raised
6 the exact federal claim. *See Casey*, 386 F.3d at 914 (citations omitted).

7 Petitioner’s objections cited *Peterson v. Lampert* to support the proposition
8 “raising a state claim [which] is functionally identical to a federal claim is sufficient to
9 fairly present a federal claim” but the court in *Peterson* did not reach this holding. 319
10 F.3d 1153, 1160 (9th Cir. 2003) (en banc) (“We need not decide whether, after *Duncan*,
11 citation of an identical or functionally identical state-law claim is sufficient to present a
12 federal claim . . .”). In fact, the Ninth Circuit found the petitioner in *Peterson* failed to
13 show the standards under state and federal law are more than similar and held the
14 petitioner’s “reference to the right to adequate assistance of counsel under the Oregon
15 Constitution did not fairly present his federal claim of ineffective assistance of counsel
16 under the Federal Constitution.” *Id.* at 1161. The court in *Peterson* did note some
17 circuits previously held (before *Duncan v. Henry*, 513 U.S. 364 (1995)) that presenting a
18 state-law claim which is functionally identical to a federal claim is sufficient to fairly
19 present the federal claim, however, the Ninth Circuit expressly did not adopt this
20 approach in *Peterson*. *Id.* at 1160 (stating “[t]he Supreme Court in *Duncan* left open the
21 question of what happens when the state and federal standards are not merely similar, but
22 are, rather, identical or functionally identical”); *see also Sanders v. Ryder*, 342 F.3d 991,
23 1000 (9th Cir. 2003) (recognizing “*Peterson* did not decide whether a prisoner may
24 exhaust a federal constitutional claim by referring to a state constitutional right when the
25 contours of the federal and state constitutional rights are identical”). Thus, *Peterson* does
26 not support Petitioner’s proposition.

27 The Ninth Circuit’s decision in *Sanders* could offer Petitioner a little more
28 support, but even *Sanders* is not dispositive here. In *Sanders*, the Ninth Circuit

1 distinguished *Peterson* and recognized an ineffective assistance of counsel claim was
2 exhausted when (1) a pro se petitioner relied on federal authority in his briefing and (2)
3 the Washington state courts analyze both the state and federal claims under an identical
4 *Strickland* standard. *Sanders*, 342 F.3d at 999-1000. The Ninth Circuit, however, found
5 it significant the petitioner there was pro se on direct appeal and had in fact cited federal
6 authority in one of his briefs in support of his argument. *Id.* at 999-1001. Unlike the
7 petitioner in *Sanders*, Petitioner was represented by counsel on appeal to the Arizona
8 Court of Appeals, and Petitioner’s briefing did not reference federal authority for his
9 arguments. “Where [] the citation to the state case has no signal in the text of the brief
10 that the petitioner raises federal claims or relies on state law cases that resolve federal
11 issues, the federal claim is not fairly presented.” *Casey*, 386 F.3d at 912 n.13 (internal
12 citations omitted). “[W]e cannot assume federal claims were impliedly brought by virtue
13 of the fact that they may be ‘essentially the same’ as state law claims. *Id.* at 914.

14 Further, even if the Court were to assume that raising a claim that is identical
15 under state and federal law could satisfy the exhaustion requirement, Petitioner would not
16 have exhausted his state court remedies here because Petitioner failed to show his
17 particular claim would be treated identically under state and federal law. Petitioner’s
18 objections to the R&R argued Article II, Section 23 of the Arizona Constitution (the state
19 constitution’s Sixth Amendment analog) “provides substantially the same right to a jury
20 trial as does the Sixth Amendment.” (Doc. 23 at 2) (citing *State v. Ring*, 204 Ariz. 534
21 (Ariz. 2003) and referencing *State v. Carlson*, 202 Ariz. 570 (Ariz. 2002) which
22 interprets defendant’s right to trial by an impartial jury under the Arizona Constitution as
23 co-extensive with the Sixth Amendment to the U.S. Constitution). However, Petitioner
24 must show Arizona courts treat Petitioner’s particular claimed violation identically under
25 both the state and federal constitutions. *Fields v. Waddington*, 401 F.3d 1018, 1022-1023
26 (9th Cir. 2005) (citing *Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam) and
27 looking to state case law to see whether the state courts have treated a claimed
28 constitutional violation regarding a jury instruction under state law identically to its

1 treatment under the federal Constitution). Here, Petitioner raised an issue with reducing
2 his jury to less than twelve people when he was tried for a crime which could result in a
3 sentence of over thirty years. (Doc. 13-3 at 1-27.) Under the Arizona Constitution,
4 “[j]uries in criminal cases in which a sentence of death or imprisonment for thirty years
5 or more is authorized by law shall consist of twelve persons.” Ariz. Const., art. II, § 23.
6 This protection is only articulated in the Arizona constitution. *Compare* Ariz. Const., art.
7 II, § 23 *with* U.S. Const. amend. VI. The federal constitution contains no requirement
8 that criminal juries have 12 members. *United States v. Brown*, 784 F.3d 1301, 1303 (9th
9 Cir. 2015). Petitioner only presented arguments regarding the jury size under Arizona
10 state law and, thus, the state claim Petitioner presented to state court cannot be construed
11 as identical to a federal claim. Therefore, Petitioner’s second basis for arguing he
12 exhausted his claim is not convincing.

13 Accordingly,

14 **IT IS ORDERED** the Report and Recommendation (Doc. 21) is **ADOPTED**.


15 **IT IS FURTHER ORDERED** the Petitioner’s objections to Magistrate Judge
16 Burn’s Report and Recommendation (Doc. 23) are **OVERRULED**.

17 **IT IS FURTHER ORDERED** Petitioner’s motion to strike the second and third
18 grounds for relief (Doc. 16) is **GRANTED**.

19 **IT IS FURTHER ORDERED** Petitioner’s first ground for relief as stated in his
20 Amended Petition for Writ of Habeas Corpus (Doc. 5) is **DENIED** and **DISMISSED**
21 **WITH PREJUDICE**.

22 **IT IS FURTHER ORDERED** a Certificate of Appealability and leave to proceed
23 *in forma pauperis* on appeal is **DENIED** because the dismissal is justified by a plain
24 procedural bars and jurists of reason would not find the procedural ruling debatable.

25 Dated this 13th day of January, 2017.

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Honorable Roslyn O. Silver
Senior United States District Judge