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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 John Richard Tacquard,
10 Petitioner,

11 v.

12 Attorney General of the State of Arizona, et
13 al.,

14 Respondents.

No. CV-18-02711-PHX-DJH

ORDER

15 This matter is before the Court on Petitioner John Richard Tacquard's ("Petitioner")
16 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) ("Petition") and
17 the Report and Recommendation ("R&R") issued by United States Magistrate Judge
18 Michelle H. Burns on November 19, 2019 (Doc. 34). Following a sound analysis,
19 Magistrate Burns recommended the Petition be denied and dismissed with prejudice. (*Id.*
20 at 21). Petitioner filed an Objection (Doc. 35), to which Respondents did not respond.
21 Petitioner has also subsequently filed a Motion for Issuance of Subpoena (Doc. 36); a
22 Notice of Subpoena (Doc. 37); a Motion to Compel Disclosure by Respondents of
23 Complete and Accurate State Court Documentary Evidence not Submitted by Respondents
24 to District Court to Date (Doc. 38); a Notice Preserving Claim of Error of Adjudicative
25 Facts Plain Intentional Error by Respondents Refusal to Comply with Mandatory Court
26 Rule Concerning all State Court Record Being Incomplete and Inaccurate/Prosecutor
27 Misconduct (Doc. 39); a Motion for Judgment on the Pleadings (Doc. 40); a Motion for
28 Copy of Court Docket (Doc. 41); and a Motion for Court Docket and Certified Copies

1 (Doc. 42) (collectively, “Post-Objection Filings”).

2 Prior to issuing her R&R on his Petition, Judge Burns denied a motion from
3 Petitioner (Doc. 21) requesting various documents and discovery from Respondents.
4 (Doc. 26). Petitioner then appealed that ruling to this Court, which is also pending before
5 the Court. (Doc. 30).

6 **I. The R&R**

7 As detailed below, Petitioner raises seven grounds for relief in his timely-filed
8 Petition:

- 9 (1) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
10 were violated because the trial court “abused [its] authority” by “applying
11 [an] unpublished case opinion”;
- 12 (2) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
13 were violated when Maricopa County Attorney Jeffrey Davendack
14 intentionally suppressed physical evidence;
- 15 (3) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
16 were violated when the trial court abused its discretion;
- 17 (4) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
18 were violated because his trial counsel was ineffective. Petitioner
19 specifically argues counsel failed to: (a) properly investigate the VIN; (b)
20 interview Detective Winston Brown regarding the VIN; (c) present
21 Elmore’s testimony; (d) seek to suppress screwdriver testimony; (e) request
22 a Willits instruction; and (f) report trial court’s error for using an
23 unpublished case to preclude the “bill of sale” testimony;
- 24 (5) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
25 were violated when the trial court “refused to rule on Pre-Evidentiary
26 Hearing Motions”;
- 27 (6) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
28 were violated because his post-conviction relief counsel was ineffective;
and
- (7) Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
were violated when the Arizona Court of Appeals “refused to address the
proven issues with record in support.”

(Doc. 34 at 5-6; *see also* Docs. 5, 1). The Magistrate Judge determined that the claims
stated in Grounds One, Two, Three, Five, Six, and Seven were procedurally defaulted
without an excuse for the default, and that Ground Four failed on the merits. (Doc. 34 at
6). The Magistrate Judge recommends that the Petition be denied and dismissed with

1 prejudice. (*Id.* at 21).

2 **II. Petitioner’s Appeal**

3 The Court will first address Petitioner’s Appeal (Doc. 30) of Magistrate Judge
4 Burns’ Order (Doc. 26) denying his Motion for an Order Compelling Discovery of All
5 State Court Briefs and Decisions. In denying Petitioner’s Motion, Magistrate Judge Burns
6 found that Petitioner had failed to establish good cause for his requests under Rule 6 of the
7 Rules Governing § 2254 Cases. She also noted that Petitioner had been provided with all
8 of the responsive documents Respondents had utilized in their Limited Answer to the
9 Petition for Writ of Habeas Corpus. In his Appeal, Plaintiff contends that the requested
10 “documents and state court decisions on those documents are not discovery requests – they
11 are Court Rule 5(d)(1)(2)(3) Governing Section 2254 mandatory disclosures respondents
12 must submit to this Court, that has not been complied with to date. . .” (Doc. 30 at 1-2).
13 He also broadly asserts that there has been “substantial suppression of historical state court
14 documents and record by Respondents blatant Court Rule violation [sic].” (*Id.* at 2).

15 **A. Standard of Review**

16 “A district judge may reconsider a magistrate’s order in a pretrial matter if that order
17 is ‘clearly erroneous or contrary to law.’” *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th
18 Cir. 2002) (quoting 28 U.S.C. § 636(b)(1)(A)). *See also Grimes v. City & County of S.F.*,
19 951 F.2d 236, 240 (9th Cir. 1991) (“The district court shall defer to the magistrate’s orders
20 unless they are clearly erroneous or contrary to law.”) (citing Fed. R.Civ. P. 72(b)). “The
21 clearly erroneous standard applies to the magistrate judge’s factual findings while the
22 contrary to law standard applies to the magistrate judge’s legal conclusions, which are
23 reviewed *de novo*.” *Lovell v. United Airlines, Inc.*, 728 F. Supp. 2d 1096, 1100 (D. Haw.
24 2010) (quoting *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007)).
25 Under the “clearly erroneous” standard, “‘a reviewing court must ask whether, ‘on the
26 entire evidence,’ it is ‘left with the definite and firm conviction that a mistake has been
27 committed.’” *In re Optical Disk Drive Antitrust Litigation*, 801 F.3d 1072, 1076 (9th Cir.
28 2015) (internal quotes omitted). *Accord Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

1 “A decision is contrary to law if it applies an incorrect legal standard or fails to consider
2 an element of the applicable standard.” *Lovell*, 728 F. Supp. at 1101 (internal quotations
3 omitted).

4 **B. Analysis**

5 In his Appeal, Petitioner contends that Respondents were obligated to disclose his
6 requested documents under Rule 5(d). In doing so, he states that various documents from
7 the state court proceedings were not disclosed with Respondents’ Answer and that the
8 disclosure of these documents is mandatory under Rule 5(d). He says Rule 5(d) requires
9 that Respondents “supply the Court with ANY brief and ANY prosecution answer and
10 ANY court opinions and dispositive order.” (Doc. 30 at 2). Accordingly, he argues,
11 without clear reference, that Respondents have failed to disclose over 40 documents from
12 his state court proceedings.

13 First, the Court agrees with the Magistrate Judge that Petitioner was provided with
14 all responsive documents used in Respondents’ Answer, several of which appear to be
15 documents Petitioner requested in his Motion. Second, Petitioner’s reading of Rule 5(d) is
16 too broad. Subsections 5(d)(1)(2) and (3) of the Rules Governing Section 2254 cases
17 provide that a respondent must file with its answer, a copy of “any brief that the petitioner
18 submitted in an appellate court contesting the conviction or sentence, or contesting an
19 adverse judgment or order in a post-conviction proceeding,” “any brief that the prosecution
20 submitted in an appellate court relating to the conviction or sentence,” and “the opinions
21 and dispositive orders of the appellate court relating to the conviction or the sentence.” *See*
22 Rule 5(d)(1)(2) and (3) of the Rules Governing Section 2254. On its plain terms, Rule 5(d)
23 does not mandate the breadth of disclosure Petitioner suggests; indeed, it certainly does not
24 contemplate that a respondent shall disclose every submission filed or order issued in
25 Petitioner’s state court proceedings. It is not clear from Petitioner’s motion whether his
26 requested documents fall within one of the three categories of Rule 5(d)’s mandated
27 disclosure. By the descriptions Petitioner gives, some clearly do not, as they were not filed
28 in an appellate court or issued by an appellate court, e.g., Petitioner’s requested “pre-

1 evidentiary hearing motions.” (Doc. 21 at 2).

2 Petitioner also argues Magistrate Burns erred by applying Rule 6 of the Rules
3 Governing Section 2254 cases to his disclosure requests. But Judge Burns’ application of
4 Rule 6’s good cause standard was not contrary to law. *Lovell*, 728 F. Supp. at 1101. She
5 correctly noted that unlike a regular civil litigant, a habeas petitioner is not entitled to
6 discovery as a matter of course. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6 of
7 the Rules Governing Section 2254 cases provides that, for good cause, the court may
8 “authorize a party to conduct discovery under the Federal Rules of Civil Procedure and
9 may limit the extent of discovery.” Rule 6 further provides that the party “requesting
10 discovery must provide reasons for the request,” and must “include any proposed
11 interrogatories and requests for admission and must specify any requested documents.”
12 *Id.*; *See Bracy v. Gramley*, 52 U.S. 899, 904 (1997) (a party to a habeas corpus proceeding
13 may utilize the discovery tools available under the Federal Rules of Civil Procedure, if the
14 court grants leave to do so for “good cause shown”).

15 Petitioner argues that the disclosure of his listed documents is necessary so that he
16 can respond to Respondents’ exhaustion arguments. Notably, Petitioner does not identify
17 which of these documents is responsive to Respondents’ exhaustion arguments, or which
18 ones would reflect that the claims in his federal habeas petition have been fairly presented
19 to the state court. A review of the documents submitted with Respondents’ Limited
20 Answer to Petitioner’s Petition shows that Respondents disclosed (1) the briefing Petitioner
21 and Respondents submitted to the Arizona Court of Appeals on direct appeal; (2) the
22 Arizona Court of Appeals Mandate and Memorandum Decision; (3) the briefing Petitioner
23 and Respondents submitted in his Post-Conviction Relief proceedings, and Petitioner’s
24 Petition for Review; and (4) the Arizona Court of Appeals Mandate and Memorandum
25 Decision on Petitioner’s Petition for Post-Conviction Relief. (Doc. 13-1, List of Exhibits
26 at 1). These are the record documents that are relevant to the exhaustion query. The fact
27 that Petitioner’s entire state court record is not being provided to the Court does not indicate
28 an intent to deceive the Court – nor does it establish the cause needed to mandate the

1 additional disclosure. “[C]ourts should not allow prisoners to use federal discovery for
2 fishing expeditions to investigate mere speculation.” *Calderon v. United States District*
3 *Court (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996). The Court therefore cannot find that
4 Judge Burns erred in finding that Petitioner had not shown good cause for the additional
5 disclosure.

6 For the foregoing reasons, the Court concludes that Judge Burns’ denial of
7 Petitioner’s motion was not contrary to law. Rule 5(d) does not mandate the extensive
8 disclosure Petitioner says it does. The Court also agrees with Judge Burns’ conclusion that
9 Petitioner has not demonstrated good cause for the additional requested documents.
10 Petitioner’s Appeal is denied.

11 **III. Petitioner’s Objection to the R&R**

12 Petitioner filed an Objection to Judge Burns’ R&R on January 31, 2018 (Doc. 35).
13 As in his Appeal, Petitioner generally objects that he has not been provided a complete
14 record of his state court proceedings, and that a complete record would show that he
15 properly exhausted all of his claims. He repeats this complaint in his Post-Objection
16 Filings (Docs. 35-42), which the Court will construe as untimely objections to the R&R.

17 **A. Standard of Review**

18 This Court must “make a *de novo* determination of those portions of the report or
19 specified proposed findings or recommendations to which” a Petitioner objects. 28 U.S.C.
20 § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b)(3) (“The district judge must determine *de*
21 *novo* any part of the magistrate judge’s disposition that has been properly objected to.”);
22 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (same).
23 Further, this Court “may accept, reject, or modify, in whole or in part, the findings or
24 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ.
25 P. 72(b)(3). At the same time, however, the relevant provision of the Federal Magistrates
26 Act, 28 U.S.C. § 636(b)(1)(C), “does not on its face require any review at all. . . of any
27 issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1989);
28 *see also Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005) (“Of course, *de novo*

1 review of a R&R is only required when an objection is made to the R&R”). Likewise, it
2 is well-settled that “failure to object to a magistrate judge’s factual findings waives the
3 right to challenge those findings[.]” *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir.
4 2015) (quoting *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (internal quotation
5 marks omitted) (footnote omitted)).

6 Similarly, Rule 72(b)(2) requires “specific written objections to the proposed
7 findings and recommendations.” Fed. R. Civ. P. 72(2) (emphasis added). “Although the
8 Ninth Circuit has not yet ruled on the matter, other circuits and district courts within the
9 Ninth Circuit have held when a petitioner raises a general objection to an R & R, rather
10 than specific objections, the Court is relieved of any obligation to review it.” *Martin v.*
11 *Ryan*, 2014 WL 5432133, at *2 (D. Ariz. 2014) (citing *See, e.g., Warling v. Ryan*, 2013
12 WL 5276367, at *2 (D. Ariz. 2013) (“[A] general objection ‘has the same effect as would
13 a failure to object.’”)); *Gutierrez v. Flannican*, 2006 WL 2816599 (D. Ariz. 2006) (citing
14 *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984). *See also United States v. Midgette*, 478 F.3d
15 616, 622 (4th Cir. 2007) (finding that “a party must object to [a] finding or
16 recommendation. . . with sufficient specificity so as reasonably to alert the district court of
17 the true ground for the objection” and citing cases standing for same proposition from the
18 Third, Sixth, Seventh, and Tenth Circuits).

19 **B. Analysis**

20 Petitioner’s Objection generally takes issue with the Magistrate Judge’s conclusion
21 that Petitioner failed to exhaust the claims in his Petition. He argues that “Respondents
22 have intentionally refused to submit a complete and accurate state court record to this
23 District Court” and that a complete record would prove that he exhausted all claims in his
24 Petition. (Doc. 35 at 1-2). Petitioner then lists 22 documents he says “must be disclosed
25 by Respondents proving exhaustion.” (Doc. 35 at 3). He does not explain how any of
26 these documents show that he exhausted the claims in dispute, but repeatedly argues that
27 Respondent’s refusal to “submit the mandatory state court record while advocating failing
28 to fairly present claims to each level of state courts is a falsehood committed that now the

1 Magistrate has adopted...” (Doc. 35 at 4).

2 With regards to Grounds One and Two, the Magistrate Judge correctly noted that
3 the claims therein were presented in Petitioner’s PCR petition, but not on direct appeal.
4 (Doc. 34 at 11, 12). The Magistrate Judge found that these claims were accordingly
5 procedurally defaulted under state law, as they could have been presented on direct appeal,
6 but were not, and Petitioner was now barred from returning to adjudicate them there. (*Id.*)
7 There is no error in this finding; Petitioner did not assert in his direct appeal that his Fifth,
8 Sixth, and Fourteenth Amendment rights were violated when the trial court referenced and
9 applied an unpublished case opinion (Ground One), or when the county attorney allegedly
10 intentionally suppressed physical evidence (Ground Two). (*See* Doc. 13-3, Ex. O at 74-
11 95). A claim that is not presented to the state courts in a procedurally correct manner is
12 properly deemed procedurally defaulted, and is generally barred from habeas relief for the
13 same reasons an unexhausted claim is generally barred: because it deprives a state court of
14 an opportunity to address the claim first. *Coleman v. Thompson*, 501 U.S. 722, 731-32
15 (1991). Any objection Plaintiff has as to the Magistrate Judge’s finding that Grounds One
16 and Two were procedurally defaulted are overruled.

17 The Magistrate Judge similarly found Grounds Three, Five, Six, and Seven were
18 procedurally defaulted because Petitioner had failed “to present the claims alleged [therein]
19 to any level of state court.” (Doc. 34 at 12). As noted above, Petitioner repeatedly asserts
20 that various documents are missing from the record on review that would show he
21 exhausted these claims. Again, however, Petitioner does not specify which, if any, of these
22 documents establish that he presented the claims in Grounds Three, Five, Six and Seven to
23 any state court. Because Petitioner has failed to alert this Court “of the true ground for the
24 objection” with enough specificity, he has not triggered a *de novo* review of his objection
25 that the claims in Grounds Three, Five, Six, and Seven are unexhausted. *Midgette*, 478
26 F.3d at 622. Notwithstanding, the Court has carefully reviewed (1) Petitioner’s direct
27 appeal briefing (Doc. 13-3, Exs. O & Q); (2) the Arizona Court of Appeals’ ruling on his
28 direct appeal (Doc. 13-3, Ex. R); (3) Petitioner’s *pro se* Supplemental Petition for Post-

1 Conviction Relief brief and supporting reply brief (Doc. 13-3, Exs. T & V); and (4) the
2 Arizona state court’s rulings on his Petition for Post-Conviction Relief (Doc. 13-3, Exs. W
3 & Y), all of which were in the record before the Magistrate Judge, and agrees that none of
4 these documents reflect that Petitioner fairly presented the issues presented in Grounds
5 Three, Five, Six, and Seven to a state court at any level, at any time. The Petitioner’s
6 objection to the Magistrate Judge’s conclusion as to Grounds Three, Five, Six, and Seven
7 are therefore also overruled. Moreover, the Court agrees with the Magistrate Judge that
8 Petitioner has failed to establish cause or prejudice that would excuse the defaults.
9 Specifically, the Court rejects that Petitioner’s *pro se* status is cause to excuse his defaults.
10 The Court also agrees with the Magistrate that despite his proclamations that his
11 “innocence is a fact,” he has not demonstrated any other cause and prejudice or a
12 fundamental miscarriage of justice that would excuse these defaults. *Coleman*, 501 U.S.
13 at 750-51.

14 Finally, Petitioner has not objected to the Magistrate Judge’s assessment of his
15 Ground Four claims, which were evaluated on the merits. The Court has nevertheless
16 reviewed the Magistrate Judge’s analysis and agrees with and adopts her recommendations
17 as to Ground Four and its sub-parts.

18 Accordingly,

19 **IT IS ORDERED** that Petitioner’s Appeal of Magistrate Judge Burns’ Order
20 denying his motion for an order requesting documents and discovery from Respondents
21 (Doc. 30) is **DENIED**.

22 **IT IS FURTHER ORDERED** that Magistrate Judge Burns’ Report and
23 Recommendation (Doc. 34) is **ACCEPTED** and **ADOPTED** as the Order of this Court.
24 Petitioner’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is
25 **DENIED** and **DISMISSED WITH PREJUDICE**. All of Petitioner’s Post-Objection
26 Filings (Docs. 35-42) are also **DENIED**.


27 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
28 Section 2254 Cases, a Certificate of Appealability and leave to proceed in forma pauperis

1 on appeal are **DENIED** because dismissal of the Petitioner is justified by a plain procedural
2 bar and reasonable jurists would not find the ruling debatable.

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

5 Dated this 18th day of November, 2020.

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Honorable Diane J. Humetewa
United States District Judge