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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Daniel Allen Negrete,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

) No. CV-09-8001-PCT-ROS

) **ORDER**

Background

On July 1, 2009, Magistrate Judge Burns issued a Report and Recommendation recommending dismissal of Petitioner’s Application for Writ of Habeas Corpus with prejudice for failing to state a claim “cognizable on habeas review” (Doc. 11 at 4). On July 6, 2009, Petitioner filed a Motion to Dismiss Without Prejudice (Doc. 12) and, on July 13, 2009, objected to Judge Burn’s recommendation dismissing the Application with prejudice (Doc. 13). According to the Motion and Objection, Petitioner intends to re-file an amended Application which would include an ineffective assistance of counsel claim. On July 29, 2009, Respondents responded, arguing amendment would be futile because Petitioner’s ineffective assistance claim is unexhausted and procedurally defaulted (Doc. 15). On August 5, 2009, Petitioner replied that the ineffective assistance claim is “an available remedy” currently pending in the state courts (Doc. 16). For the following reasons, Petitioner’s

1 Motion will be denied, the Report and Recommendation will be adopted and the Application
2 will be dismissed with prejudice.

4 Discussion

5 1. Standard

6 A “district judge may refer dispositive pretrial motions and petitions for writ of habeas
7 corpus to a magistrate, who shall conduct appropriate proceedings and recommend
8 dispositions.” Thomas v. Arn, 474 U.S. 140, 141 (1985); see 28 U.S.C. § 636(b)(1)(B);
9 Estate of Conners v. O’Connor, 6 F.3d 656, 658 (9th Cir. 1993). Any party “may serve and
10 file written objections” to the magistrate’s report and recommendation. 28 U.S.C. §
11 636(b)(1). “A judge of the court shall make a *de novo* determination of those portions of the
12 report or specified findings or recommendations to which objection is made.” Id. (emphasis
13 added). A district judge “may accept, reject, or modify, in whole or in part, the findings or
14 recommendations made by the magistrate.” Id. District courts are not required to conduct
15 “any review at all . . . of any issue that is not the subject of an objection.” Thomas, 474 U.S.
16 at 149; see also U.S. v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (It is
17 “clear that the district judge must review the magistrate judge’s findings and
18 recommendations *de novo if objection is made*, but not otherwise.”); Schmidt v. Johnstone,
19 263 F. Supp. 2d 1219, 1126 (D. Ariz. 2003) (same).

21 2. Dismissal Without Prejudice

22 Petitioner’s ineffective assistance of counsel claim, the basis for Petitioner’s motion
23 for dismissal without prejudice, was raised in Arizona Superior Court via a successive
24 Petition for Post Conviction Relief (“PCR”) filed on April 9, 2009 (Doc. 15 Ex. A). On
25 April 24, 2009, the PCR was summarily dismissed for failure to comply with the
26 requirements for successive PCR petitions found in Arizona Rules of Criminal Procedure
27 32.1 and 32.2 (Doc. 15 Ex. B). Although the summary dismissal has been appealed to the
28 Arizona Court of Appeals (Doc. 15 Ex. C), Petitioner does not explain on what ground the

1 Court of Appeals will reverse the Superior Court’s determination and reach the merits of the
2 PCR, other than with a conclusory statement asserting: “Claims about effective assistance
3 of counsel in the first Rule 32 for pleading defendants are to be raised in a successive Rule
4 32 . . . The claims cannot be presented in the first Rule 32” (Doc. 16).

5 Given the disposition of Petitioner’s state court proceedings and Petitioner’s failure
6 to explain why the pending PCR has any likelihood of being adjudicated on the merits, it is
7 assumed that the state courts will never reach the merits of the PCR and the claims contained
8 therein are procedurally defaulted.¹ See Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir. 2002)
9 (“If a state court determines that a claim is procedurally barred, we are precluded from
10 reviewing the merits of the claim if the procedural bar is adequate and independent.”); Smith
11 v. Stewart, 241 F.3d 1191, 1995 n.2 (9th Cir. 2001) (Rule 32 procedural bar is “regularly
12 followed” and thus an adequate ground for procedural default), *rev’d on other grounds by*
13 Stewart v. Smith, 536 U.S. 856 (2002). While a petitioner may overcome procedural default
14 by showing “cause and prejudice or, alternatively, a fundamental miscarriage of justice,”
15 neither Petitioner’s Motion nor Objection makes such showing. Beaty, 303 F.3d at 987.
16 Thus, Petitioner’s request for dismissal without prejudice, in order to amend the Application,
17 is futile and will be denied.

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19 Accordingly,

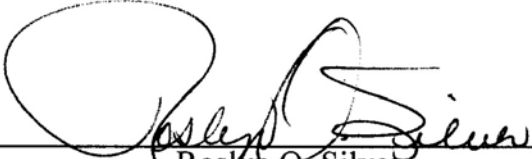
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23 ¹ 28 U.S.C. § 2254(b)(1) (“An application for a writ of habeas corpus on behalf of a
24 person in custody pursuant to the judgment of a State court shall not be granted unless it
25 appears that – the applicant has exhausted the remedies available in the courts of the State;
26 or there is an absence of available State corrective process; or circumstances exist that render
27 such process ineffective to protect the rights of the applicant.”); Swoopes v. Sublett, 196 F.3d
28 1008, 1010 (9th Cir. 1999) (*per curiam*) (“Recognizing that each state is entitled to formulate its
own system of post-conviction relief . . . we must credit Arizona’s choice. Thus, except in habeas
petitions in life-sentence or capital cases, claims of Arizona state prisoners are exhausted for
purposes of federal habeas once the Arizona Court of Appeals has ruled on them.”).

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IT IS ORDERED Magistrate Burns' Report and Recommendation (Doc. 11) **IS ADOPTED IN FULL** and Petitioner's Application for Writ of Habeas Corpus (Doc. 1) **IS DISMISSED WITH PREJUDICE.** The Clerk of Court shall close this case.

FURTHER ORDERED Petitioner's Motion (Doc. 12) **IS DENIED.**

DATED this 27th day of August, 2009.



Roslyn O. Silver
United States District Judge