

1 not required to conduct “any review at all . . . of any issue that is not the subject of an
2 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28
3 U.S.C. § 636(b)(1) (“the court shall make a *de novo* determination of those portions of
4 the [report and recommendation] to which objection is made.”). Thus, the Court will
5 review the portions of the R&R to which Petitioner objected *de novo*.

6 The R&R recommends that this Court find that the Petition in this case is barred
7 by the one year statute of limitations created by the Anti-Terrorism and Effective Death
8 Penalty Act (“AEDPA”). R&R at 8-14. Absent tolling, the R&R concluded that the
9 statute of limitation for Petitioner to file his Petition expired on September 13, 2013.
10 R&R at 11. Thus, absent tolling, the Petition in this case, which was filed on April 22,
11 2015, is untimely.

12 The R&R then concludes that Petitioner’s “motion for clarification” that was
13 pending in state court from September 12, 2012 to March 5, 2015, does not qualify for
14 statutory tolling because it was not an “application for State post-conviction or other
15 collateral review” under 28 U.S.C. § 2244(d)(2). R&R at 12. Petitioner objects to this
16 conclusion and argues that his “motion for clarification” should be construed as one
17 under Arizona Rule of Criminal Procedure 32. Objections at 5. As the R&R correctly
18 notes, the Arizona Court of Appeals refused to treat Petitioner’s motion for clarification
19 as an Arizona Rule of Criminal Procedure 32 petition. R&R at 12-13. This Court cannot
20 reclassify Petitioner’s motion in state court in a way the Arizona Court of Appeals has
21 already rejected. Therefore, the Court accepts the recommendation of the R&R, and
22 overrules Petitioner’s objection, and finds that the “motion to clarify” did not entitle
23 Petitioner to statutory tolling of his statute of limitations.

24 Next, the R&R concludes that Petitioner is not entitled to equitable tolling of his
25 statute of limitations. R&R at 13-14. Petitioner makes no argument in his objections that
26 any extraordinary circumstance prevented him from timely filing in federal court.
27 Therefore, the R&R is accepted and adopted on this point.

28 Based on the foregoing, because the statute of limitations for filing this Petition

1 expired on September 13, 2013, and that date is not subject to tolling, the Petition in this
2 case, filed on April 22, 2015, is barred by the statute of limitations.

3 Alternatively, even if this Petition was not barred by the statute of limitations;
4 Petitioner failed to exhaust it because he did not present it to the state court's in a
5 procedurally correct manner. Further, the time to exhaust has expired; thus, he has
6 procedurally defaulted the claim. *See* R&R at 14 n.6. Petitioner has not shown cause and
7 prejudice or actual innocence to overcome this default. Therefore, the Court will deny
8 the claim for this alternative reason.

9 Finally, even if this Court were to consider the merits of this claim, Petitioner
10 would not be entitled to relief. Petitioner's theory of relief has evolved at various stages
11 of these proceedings. *See* R&R at 2-6 (recounting what Petitioner argued at the state
12 court verses what Petitioner argued in his Petition verses what Petitioner argued in his
13 Reply to the Petition); *see also* Objections at 1-4 (arguing another version of this claim).
14 In the state court, Petitioner argued that ADC miscalculated his release date and that the
15 state should be bound by that miscalculation because his release date was "vindictively"
16 audited and recalculated. R&R at 3. In his Petition, Petitioner seemed to argue that the
17 state court sentencing judge made an error of state law in calculating his sentence. R&R
18 at 6. After Respondents answered and argued that such a claim was not cognizable on
19 habeas as an error of state law, Petitioner in his Reply argued that his Fifth, Eighth and
20 Fourteenth Amendment rights are being violated because he continues to be in custody
21 after the expiration of his sentence. R&R at 7. As of his objections, Petitioner has
22 seemingly abandoned all of these theories and now argues that his original sentence was
23 inconsistent with his plea agreement and that he should be re-sentenced consistent with
24 the terms of his plea agreement.

25 In 2001, Petitioner entered into a plea agreement that resolved two cases: CR2001-
26 0192 and CR2001-0380. As a result of that plea, Petitioner received a 7.5 year sentence
27 on Count II in CR2001-0192. Doc. 15-1 at 83. Petitioner received a 2.5 year sentence on
28 Count III in CR2001-0192, to run concurrent to the 7.5 year sentence on Count II. *Id.*

1 Petitioner received a 1.5 year sentence in CR2001-0380, to run concurrent to the 7.5 and
2 2.5 years in CR2001-0192. All of these sentences (which per the plea agreement were
3 concurrent to themselves) were to run consecutive to the term Petitioner was “currently”
4 serving in 2001 at the time of sentencing. *Id.*

5 At the time of the 2001 sentencing, Petitioner was serving three sentences: In
6 CR1999-0695, Petitioner had a 3 year sentence. *Id.* at 84. In CR 1999-0697, Petitioner
7 had a 2.5 year sentence that was running concurrent to Petitioner’s 3 year sentence in
8 CR1999-0695. *Id.* at 81-82. In CR1999-0593, Petitioner had a 12 year sentence that was
9 consecutive to the 3 year sentence in CR 1999-0695 and the 2.5 year sentence in
10 CR1999-0697. Petitioner’s 2001 sentences were all consecutive to his 1999 sentences.
11 *Id.* at 83.

12 In his objections, Petitioner states: “Objection to the unreasonable determination
13 that Petitioner does not have a constitutional right to the enforcement of the promise
14 made by the prosecutor as part of the plea agreement to have the sentences run
15 consecutively to the term then currently being served....” Objection at 2. As far as the
16 Court can determine, Petitioner’s argument is that the three 1999 convictions and
17 sentences for which he was incarcerated at the time of the 2001 sentencing are not the
18 “term” he was serving. Instead, Petitioner argues that each 1999 conviction must be
19 broken out separately, and at the moment of his 2001 sentencing he was serving the 3
20 year portion of the 1999 sentences; therefore his 2001 sentence is consecutive to his 3
21 year sentence, but concurrent to his 12 year sentence. This argument is inconsistent with
22 every part of the record.

23 First, the plea agreement itself said that the three 2001 sentences would be
24 concurrent to each other, but consecutive to Petitioner’s current term. Doc. 15-1 at 11,
25 lines 26-28. Next, at sentencing, the sentencing judge was explicitly clear that (as was
26 required by Arizona law), Petitioner’s sentence on the 2001 crimes would run
27 consecutive to the approximately 10 years Petitioner’s was already serving. Doc. 15-1 at
28

1 151-152.¹ Further, when the 2001 sentencing judge said Petitioner would serve 16 more
2 years (the entire 1999 sentence with the consecutive 2001 7.5 year sentence), Petitioner
3 corrected the Judge and said, “Actually, 21 years.” Doc. 15-1 at 154. To which the 2001
4 sentencing judge responded “21 years altogether. I didn’t know what you got in the other
5 case, I just presumed it might have been ten....” *Id.* Thus, both the Judge’s intent and
6 Petitioner’s understanding of his plea and sentence are absolutely clear. Petitioner’s
7 current argument that he believed his plea entitled him to a sentence that was consecutive
8 to only his 3 year 1999 sentence is so belied by the record that is completely without
9 merit.

10 Accordingly,

11 **IT IS ORDERED** that the Report and Recommendation (Doc. 18) is accepted as
12 to the recommendation that the Petition be denied on procedural grounds; alternatively
13 the Petition is denied on the merits; the objections (Doc. 20) are overruled; the Petition
14 dismissed with prejudice and the Clerk of the Court shall enter judgment accordingly.

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23 ¹ In fact, Petitioner was serving 15 years on the 1999 convictions. However, at
24 Petitioner’s request, the Court proceeded to sentencing the same day as the change of
25 plea hearing and did not have the opportunity to do an exact calculation. Nonetheless, it
26 is clear that the Court was running the 2001 sentence consecutive to all the 1999
27 sentences, not only the three year one. Doc. 15-1 at 151-53. Moreover, the sentencing
28 court acknowledged that such a result was mandatory under Arizona law. Doc. 15-1 at
151 ((transcript of sentencing hearing) the Court stated: “These sentences must be
consecutive, not only because it’s in the plea agreement, but because they are escape
charges and the law mandates that they be consecutive.”). The 2001 sentencing judge
went on to state, “All three [2001] sentences are concurrent one with the other but
consecutive to **any time** the defendant is currently serving.” *Id.* at 153 (emphasis added)
(the pages of the transcript were filed out of order at original pages 25 and 26).

