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

8
9 Kenneth Allen Montiel,
10 Petitioner,

No. CV-17-08017-PCT-JAT

ORDER

11 v.

12 Carla Hacked-Agnew, et al.,
13 Respondents.
14

15 Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus. (Doc.
16 1). The Magistrate Judge to whom this case is assigned issued a Report and
17 Recommendation ("R&R") recommending that the Petition be denied and dismissed with
18 prejudice. (Doc. 16). Petitioner filed an objection to the R&R. (Doc. 17).

19 **I. REVIEW OF R&R**

20 This Court "may accept, reject or modify in whole or in part, the findings or
21 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The district
22 court must review the Magistrate Judge's findings *de novo* only if a party objects to the
23 Magistrate Judge's findings or recommendations. *United States v. Reyna-Tapia*, 328 F.3d
24 1114, 1121 (9th Cir. 2003) (en banc). However, if no party objects to any fact or issue,
25 the district court is not required to engage in "any review at all . . ." *Thomas v. Arn*, 474
26 U.S. 140, 149 (1985). Accordingly, the Court will review the portions of the R&R to
27 which Petitioner has objected *de novo*.
28

1 **II. PETITION FOR WRIT OF HABEAS CORPUS**

2 In his habeas petition, Petitioner raises four grounds for relief, each claiming a
3 violation of Petitioner’s due process rights under the Fourth, Fifth, and Fourteenth
4 Amendments: (1) judicial vindictiveness, (2) judicial breach of verbal agreement during
5 settlement conference, (3) the court’s refusal to hold a suppression hearing, and (4)
6 ineffective assistance of counsel. (Doc. 1).

7 The Magistrate Judge found that the state court’s determination related to
8 Petitioner’s first ground for relief was not contrary to, nor an unreasonable application of,
9 federal law. (Doc. 16 at 11). The Magistrate Judge consequently recommended that the
10 ground be denied and dismissed. (*Id.*) Petitioner objects to the Magistrate Judge’s
11 recommendation, alleging that the state court’s decision “was/is contrary to or an
12 unreasonable application of federal law.” (Doc. 17 at 3).

13 With regard to Petitioner’s remaining grounds for relief, the Magistrate Judge
14 found that each of the grounds were procedurally barred because Petitioner had not fairly
15 presented them in state court. (Doc. 16 at 12). The Magistrate Judge subsequently found
16 no excuse for Petitioner’s procedural default. (*Id.* at 12–13). Petitioner objects to the
17 Magistrate Judge’s findings, alleging that he “ha[d] fulfilled every requirement to
18 properly exhaust [his] federal claims according to the law.” (Doc. 17 at 3).

19 **III. FACTUAL AND PROCEDURAL BACKGROUND**

20 The R&R recounts the factual and procedural background of this case, based
21 primarily on the record from state court. (Doc. 16 at 1–3). Petitioner ostensibly “disagrees
22 with the [Magistrate Judge’s] . . . factual findings,” but fails to address any specific
23 factual inadequacies or discrepancies. (Doc. 17 at 2). Petitioner has failed to show that
24 the state court record, relied on by the Magistrate Judge, was based on an unreasonable
25 determination of the facts. *See* 28 U.S.C. § 2254(d). Accordingly, the Court adopts that
26 portion of the R&R.

1 **IV. DISCUSSION**

2 **A. Ground One: Judicial Vindictiveness**

3 Petitioner’s first ground for relief is under a theory of judicial vindictiveness.
4 (Doc. 1 at 6). Petitioner claims that the state court judge was vindictive when sentencing
5 him to a 13.5-year sentence after previously mentioning that a sentence of five years
6 would probably be imposed if Petitioner lost at trial. (*Id.*). Petitioner asserts that “when a
7 . . . judge[’]s ultimate goal is a substantial ‘time increase,’” this leads to a “presumption
8 of vindictiveness violating due process, Fourth, Fifth, and Fourteenth Constitutional
9 Amendments.” (*Id.*). The Arizona Court of Appeals held that there was no judicial
10 vindictiveness. (Doc. 16 at 1–2). The Magistrate Judge recommended that Petitioner’s
11 first ground be denied and dismissed because state court’s decision was neither contrary
12 to established federal law nor based on an unreasonable factual determination. (Doc. 16
13 at 11).

14 **i. Legal Standard**

15 As explained in the R&R, federal courts “shall not” grant habeas relief, with
16 respect to claims adjudicated on the merits in state court, unless the state court’s decision
17 was (1) contrary to, or an unreasonable application of, clearly established federal law as
18 determined by the United States Supreme Court; or (2) based on an unreasonable
19 determination of the facts in light of the evidence presented in the state court proceeding.
20 (Doc. 16 at 3); *see* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412–13
21 (2000). This standard requires that federal courts give the “benefit of the doubt” to state
22 court decisions. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

23 As it relates to the first prong of the test, a state court’s decision is only contrary to
24 federal precedent if it applies a rule which contradicts the law as previously set forth in a
25 Supreme Court case, or, using “materially indistinguishable” facts from a Supreme Court
26 case, finds contrary to the Supreme Court decision. *Williams*, 529 U.S. at 404–05. The
27 first prong can also be satisfied if the state court’s decision applies a governing rule to a
28 set of facts—or extends, or fails to extend, a legal principle—in an objectively

1 unreasonable manner. *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002). To
2 satisfy the second prong, a petitioner must show that the state court made an
3 unreasonable determination of the facts in light of the evidence presented in that court’s
4 proceedings. 28 U.S.C. § 2254(d)(2).

5 **ii. Analysis**

6 The Magistrate Judge, in the R&R, discussed two United States Supreme Court
7 cases with relevant legal precedent for the issue at hand. (Doc. 16 at 10 (discussing *North*
8 *Carolina v. Pearce*, 395 U.S. 711 (1969) and *Alabama v. Smith*, 490 U.S. 794 (1989)).
9 The Magistrate Judge correctly determined that the federal law derived from those cases
10 was not unreasonably applied in the present state court case. (*Id.*) The Magistrate Judge
11 found that the Arizona Court of Appeals was reasonable in holding that there was no
12 “categorical presumption of judicial vindictiveness” in the circumstances of this case,
13 which included the “defendant reject[ing] the plea offer, go[ing] to trial, and receiv[ing] a
14 harsher sentence after trial than was available to him under the rejected plea offer”
15 (Doc. 16 at 10–11). As such, the Magistrate Judge found, and this Court agrees, that the
16 state court’s determination was not contrary to, nor an unreasonable application of,
17 federal law. Furthermore, this Court is aware of no Supreme Court case with facts
18 materially indistinguishable from the present case. As such, Petitioner failed to meet the
19 first prong of the test.

20 With respect to the second prong, the Court must identify whether the state court
21 reasonably interpreted the facts in light of the evidence presented. As discussed in the
22 R&R, the state court’s determination that there was no presumption of vindictiveness on
23 the part of the judge was based on facts in the record. (*Id.* at 11). Specifically, the
24 Magistrate Judge identified that the record reflected the reason for the increased sentence
25 as “aggravating circumstances found by the jury and judge based on trial evidence”
26 (*Id.*). These circumstances led the state court judge to impose a harsher sentence than the
27 one contemplated during the settlement conference, where the aggravating circumstances
28 had not been revealed. Because a presumption of vindictiveness could not be identified,

1 the burden was on Petitioner to show that the judge acted with actual vindictiveness.
2 This, Petitioner failed to do. Furthermore, Petitioner failed to identify a deficiency in the
3 process followed by the state court, nor does this Court find any deficiency.

4 Petitioner claims that the state court’s decision “was/is contrary to or an
5 unreasonable application of federal law,” but fails to cite any federal law or case holding
6 that would support this assertion. (Doc. 17 at 3). Petitioner only states that the state
7 court’s “performance analysis was unreasonable and its prejudice analysis was/is contrary
8 to clearly established federal law.” (*Id.*) Absent a showing of factual or legal evidence to
9 support these conclusions couched as claims, the Court finds them meritless.

10 **iii. Conclusion**

11 The Court concludes that the state court’s decision was neither contrary to clearly
12 established federal law nor based on an unreasonable factual determination. Because the
13 Magistrate Judge appropriately applied the legal standard at issue to the first ground, the
14 Court overrules Petitioner’s objections and accepts the R&R’s recommendation of denial
15 and dismissal of Petitioner’s first ground.

16 **B. Grounds Two through Four**

17 Petitioner’s remaining grounds are that (1) the court inappropriately breached a
18 verbal agreement, made between the court and Petitioner, during a settlement conference;
19 (2) the court inappropriately refused to hold a suppression hearing related to evidence
20 that Petitioner believes was illegally-seized; and (3) that Petitioner’s trial counsel was
21 ineffective in misinforming him about the state’s plea agreement,¹ and in failing to
22 request a suppression hearing related to the previously-mentioned evidence. (Doc. 1 at
23 13, 33, 44). The Magistrate Judge found these claims to be procedurally barred because
24 they had not been exhausted in state court. (Doc. 16 at 12).

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26 ¹ Petitioner simultaneously argues that he “took the judge’s word that he’d receive a
27 sentence of 5 years,” (Doc. 17 at 5), and that he was misinformed by his attorney
28 regarding the sentence under his plea agreement and believed that it would be thirty
years—alleging that, “had [he] known [that the sentence would only be five years] he
would have taken great consideration of the offer.” (Doc. 1 at 44). While it is obvious
that both of these statements cannot be true, the Court need not address this conflict
because, as discussed below, Petitioner’s claim is barred on procedural grounds.

1 **i. Legal Standard**

2 The R&R notes that, before petitioning a federal court for a writ of habeas corpus,
3 state prisoners must exhaust their remedies in state court. (Doc. 16 at 4); *see* 28 U.S.C. §
4 2254(b)(1) and (c); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *McQueary v.*
5 *Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). In Arizona, these claims must be presented
6 to the Arizona Court of Appeals through either the direct appeal process or other post-
7 conviction relief. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen*
8 *v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). Furthermore, the petitioner must “alert the
9 state courts to the fact that [he] was asserting a claim under the United States
10 Constitution.” *Sumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). General appeals to
11 constitutional guarantees are insufficient to meet the standard of presentation before state
12 courts. *Id.* at 987 (quoting *Gray v. Netherland*, 518 U.S. 1552, 163 (1996)). The United
13 States Supreme Court has held that claims not sufficiently presented to state courts in a
14 procedurally-correct manner are deemed procedurally defaulted and generally barred
15 from habeas relief. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991).

16 When alleging ineffective assistance of counsel, a claim will be procedurally
17 barred if “all operative facts” related to the claim have not been presented to the state
18 courts. *Hemmerle v. Schriro*, 495 F.3d 1069, 1075 (9th Cir. 2007). Each instance of a
19 counsel’s ineffectiveness must be separately alleged for purposes of exhaustion in state
20 court. *Gulbrandson v. Ryan*, 738 F.3d 976, 992 (9th Cir. 2013).

21 “[A]n adequate and independent finding of procedural default will bar federal
22 habeas review of the federal claim, unless the habeas petitioner can show cause for the
23 default and prejudice attributable thereto, or demonstrate that failure to consider the
24 federal claim will result in a fundamental miscarriage of justice.” *Harris v. Reed*, 489
25 U.S. 255, 262 (1989) (internal citations and quotations omitted). The Supreme Court has
26 identified that the “fundamental miscarriage of justice exception” can be used to
27 overcome procedural defaults in situations where the petitioner makes a proper showing
28 of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 384 (2013). Furthermore, a

1 petitioner’s ignorance of procedural rules due to a lack of legal training is insufficient to
2 establish “cause” for the procedural default. *See Thomas v. Lewis*, 945 F.2d 1119, 1123
3 (9th Cir. 1991) (holding that a habeas petitioner’s lack of legal training and limited access
4 to legal materials did not constitute cause to excuse procedural default).

5 **ii. Analysis**

6 The Magistrate Judge, in the R&R, identified that Petitioner failed to assert these
7 three grounds in state court. (Doc. 16 at 12). The Magistrate Judge found that Petitioner
8 failed to raise the breach of contract claim on direct appeal or in Petitioner’s Post-
9 Conviction Relief (PCR) proceedings. (*Id.*) The Magistrate Judge further found that
10 Petitioner failed to raise a claim related to suppression of evidence to the Arizona Court
11 of Appeals on review from the denial of Petitioner’s PCR petition. (*Id.*) Finally, the
12 Magistrate Judge found that Petitioner failed to raise the specific claim related to
13 ineffective assistance of counsel in Petitioner’s PCR proceedings. (*Id.*) As such, the
14 Magistrate Judge found that these three grounds were procedurally barred. (*Id.*)

15 Petitioner argues that he has “followed every rule . . . to properly present [and]
16 exhaust any and every ground(s) for relief to both the Superior then the appropriate
17 appellate courts . . . includ[ing] direct appeal, Rule 32, Petition for Review for R[ule] 32,
18 and Habeas.” (Doc. 17 at 3). After reviewing Petitioner’s brief before the Court of
19 Appeals of Arizona, (Doc. 11-6 at 111), Notice of Post-Conviction Relief (*Id.* at 159),
20 and Petition for Post-Conviction Relief (*Id.* at 164), this Court agrees with the Magistrate
21 Judge. There is no mention in any of the referenced documents that Petitioner raised a
22 breach of contract claim or a claim related to the suppression of evidence in either his
23 appeal to state court or in his PCR proceedings. Petitioner did, as the Magistrate Judge
24 notes, raise a claim related to ineffective assistance of counsel—but the claim was
25 unrelated to Petitioner’s current ground, which was that the “counsel[’]s unprofessional
26 performance cause[d] harmful error and prejudice[d] [Petitioner] and caused [Petitioner]
27 to receive a substantial[ly] higher sentence,” specifically that his counsel “misinformed
28 him about a plea agreement” and “failed to hold a suppression hearing.” (Doc. 1 at 44).

1 Petitioner’s ineffective assistance claim in state court was related to Petitioner’s counsel’s
2 failure to present mitigating evidence. (Doc. 11-6 at 169). As such, the operative facts
3 related to Petitioner’s three claims—breach of contract, suppression of evidence, and
4 ineffective assistance of counsel—have not been raised in state court and are resultantly
5 procedurally barred.

6 Petitioner notes that, in order for a state’s procedural rule to foreclose federal
7 review, the state rule must be “clear, consistently applied, and well-established at the time
8 of the petitioner’s purported default.” *Calderon v. U.S. Dist. Court for E. Dist. Of*
9 *California*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Wells v. Mass*, 28 F.3d 1005,
10 1009 (9th Cir. 1994)). However, Petitioner fails identify which, if any, state rules violate
11 the factors required by *Calderon*. To the extent that Petitioner relies on his “being
12 unlearned in law” as a reason for excusing his procedural missteps, this does not, as
13 discussed above, establish sufficient cause to excuse Petitioner’s defaults. (Doc. 17 at 4).
14 As such, this Court finds no reason why failure to follow Arizona’s procedural rules
15 should not foreclose federal review.

16 Petitioner is unable to overcome these procedural defaults through either a
17 showing of cause or a fundamental miscarriage of justice. Petitioner has not shown cause
18 which would excuse the procedural defaults, and as such, this Court will not reach the
19 issue of prejudice. *Poland v. Stewart*, 169 F.3d 573, 588 (9th Cir. 1999). Finally,
20 Petitioner has raised no claim of actual innocence which would demonstrate a
21 fundamental miscarriage of justice. Absent “evidence of innocence so strong that a court
22 cannot have confidence in the outcome of the trial,” Petitioner has not shown a
23 fundamental miscarriage of justice which would excuse Petitioner’s procedural default.
24 *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

25 **iii. Conclusion**

26 Petitioner’s remaining grounds for relief are procedurally barred. Additionally, the
27 Court agrees with the Magistrate Judge’s conclusion that Petitioner has both failed to
28 establish cause which would excuse the procedural defaults and failed to make a

1 sufficient showing of actual innocence to establish a miscarriage of justice. Therefore, the
2 Court overrules Petitioner’s remaining objections related to these grounds and accepts the
3 R&R’s recommendation that the Court deny relief on these grounds.

4 **V. CERTIFICATE OF APPEALABILITY**

5 The R&R recommends that this Court deny the issuance of a certificate of
6 appealability (“COA”). Petitioner objects to this recommendation.

7 A judge may issue a COA “only if the applicant has made a substantial showing of
8 the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The standards for granting a
9 COA are the same for petitions under § 2254 and § 2255. *See United States v. Martin*,
10 226 F.3d 1042, 1046 n.4 (9th Cir. 2000). “Where a district court has rejected the
11 constitutional claims on the merits, the showing required to satisfy § 2253(c) is
12 straightforward: The petitioner must demonstrate that reasonable jurists would find the
13 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*
14 *McDaniel*, 529 U.S. 473, 483-84 (2000); *see also id.* (describing the COA determination
15 as deciding whether the issues presented are “adequate to deserve encouragement to
16 proceed further” [quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)]). “When the
17 district court denies a habeas petition on procedural grounds without reaching the
18 prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows,
19 at least, that jurists of reason would find it debatable whether the petition states a valid
20 claim of the denial of a constitutional right *and* that jurists of reason would find it
21 debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S.
22 at 484 (emphasis added).

23 Here, with regard to Petitioner’s first ground, the Court finds that Petitioner has
24 not demonstrated that reasonable jurists would find this Court’s assessment of the
25 constitutional claims debatable or wrong. Furthermore, regarding the remaining grounds,
26 the Court finds that jurists of reason could not find it debatable whether this Court was
27 correct in its procedural rulings. Therefore, the Court will overrule Petitioner’s objection
28 to the R&R with respect to the issue of whether to grant a COA.

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VI. CONCLUSION

Based on the foregoing,

IT IS ORDERED that the R&R (Doc. 16) is accepted; the objections (Doc. 17) are overruled as specified above; the Petition for Writ of Habeas Corpus (Doc. 1) is denied, with prejudice, and the Clerk of the Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed in forma pauperis on appeal is denied.

Dated this 6th day of December, 2018.

