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

9 William Franklin Ely,
10 Petitioner,

11 v.

12 Bennie Rollins, et al.,
13 Respondents.

No. CV 17-8277-PCT-JAT

ORDER

14 Pending before the Court is Petitioner's *pro se* Petition for a Writ of Habeas
15 Corpus under 28 U.S.C. § 2254. (Doc. 1). The Magistrate Judge to whom this case is
16 assigned issued a Report and Recommendation (R&R) recommending that the Petition be
17 denied. (Doc. 8). Petitioner filed objections to the R&R. (Docs. 13 & 15).

18 **I. Review of R&R**

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

27 **II. Petition for Writ of Habeas Corpus**

28 The Petitioner raises one ground for relief in his timely petition. The R&R finds

1 that the Petitioner’s claim is procedurally defaulted without excuse. The R&R recounts
2 the factual and procedural background of this case at pages 1–4. Neither party objects to
3 this recounting. Accordingly, the Court accepts and adopts it.

4 Petitioner claims that “imposition of a mandated consecutive term of community
5 supervision to a flat-time term of confinement constitutes being punished twice for the
6 same offense,” in violation of his Fifth Amendment right against Double Jeopardy (Doc.
7 1 at 6). The R&R concludes that because Petitioner failed to raise the present claim in his
8 direct appeal to the Arizona Court of Appeals, 28 U.S.C. § 2254(b) precludes his claim
9 from being brought in federal court and it is procedurally defaulted without excuse (Doc.
10 8 at 3).

11 **A. Petitioner’s Claim for Relief is Procedurally Defaulted**

12 An application for a writ of habeas corpus shall not be granted unless it appears
13 that “the applicant has exhausted the remedies available in the courts of the State.” 28
14 U.S.C. § 2254(b)(1)(A). “An applicant shall not be deemed to have exhausted the
15 remedies available in the courts of the State, within the meaning of the section, if he has
16 the right under the law of the State to raise, by any available procedure, the question
17 presented.” 28 U.S.C. § 2254(c). A state prisoner must exhaust available state remedies,
18 in order to give the state the “opportunity to pass upon and correct” alleged violations of
19 its prisoners’ federal rights. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To provide the
20 state with this opportunity, the prisoner must “fairly present” his claim to the state’s
21 highest court. *Id.* This thereby alerts the state court to the federal nature of the claim. *Id.*
22 A claim is not “fairly presented” if the judges of the highest court in the state can
23 discover the claim only by reading the lower court opinions in the case. *Id.* at 31. To be
24 “fairly presented” a claim must be presented (1) in the proper forum, (2) through the
25 proper vehicle, and (3) with the proper factual and legal basis for the claim.
26 *Insyxiemngmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005).

27 Petitioner objects to the R&R’s conclusion that his claim for relief is procedurally
28 defaulted. (Doc. 13 at 2). Petitioner alleges a violation of his due process rights during his

1 post-conviction-review (“PCR”) proceedings when the Superior Court denied him an
2 evidentiary hearing on whether his sentence exceeded the maximum allowed in the
3 sentencing statute. (*Id.*) Accordingly, Petitioner alleges, his claim cannot be procedurally
4 barred because it was clear error for the Superior Court to preclude review of his illegal
5 sentence. (Doc. 13 at 4). Petitioner’s objections do not address his failure to raise the
6 Double Jeopardy claim on direct appeal in state court, which is the reason the claim is
7 procedurally defaulted. As explained above, Petitioner’s failure to present the Double
8 Jeopardy claim means that his claim is now procedurally barred. *See* 28 U.S.C. §
9 2254(b).

10 **B. Petitioner Has No Excuse for Procedural Default**

11 “Where a defendant has procedurally defaulted a claim [], the claim may be raised
12 in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice’
13 or that he is ‘actually innocent.’” *U.S. v. Braswell*, 501 F.3d 1147, 1149 (9th Cir. 2007)
14 (quoting *Bousley v. United States*, 523 U.S. 614, 622 (1998)). A showing of “cause”
15 ordinarily requires the prisoner to show some external factor impeded the prisoner in
16 complying with the state procedural rules. *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th
17 Cir. 2004). External factors include the reasonable unavailability of a factual or legal
18 claim at the time of the direct appeal, or interference by government officials which
19 prevented the claim from being brought earlier. *Braswell*, 501 F.3d at 1150. The prisoner
20 must show actual prejudice, not just the possibility of prejudice. *Id.*

21 Petitioner argues that the Court should still review the merits of his procedurally
22 defaulted claim because he has shown cause and prejudice. (Doc. 13 at 7). He alleges that
23 his appellate counsel did not argue the double jeopardy claim on direct appeal, thereby
24 impeding his ability to comply with the rules. (Doc. 1 at 15). However, a claim of
25 ineffective assistance of appellate counsel must itself be exhausted. *Davila v. Davis*, 137
26 S.Ct. 2058, 2065–69 (2017); *see also Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (allowing
27 an exception to the exhaustion requirement for claims of ineffective assistance of only
28 trial counsel if such failure to exhaust was caused by the ineffective assistance of post-

1 conviction relief counsel). Thus, Petitioner has not presented any outside evidence that an
2 external force impeded him in his ability to bring the Double Jeopardy claim on direct
3 review, and the procedural default is therefore not excused for cause.

4 Even assuming arguendo that the Court could reach the merits of Petitioner's
5 Petition, his claim nonetheless fails. The Double Jeopardy Clause protects against the
6 imposition of multiple punishments for the same criminal offense. *Moor v. Palmer*, 603
7 F.3d 658, 660 (9th Cir. 2010). Parole revocation is not a criminal penalty for violating the
8 terms of parole; it is a continuation of punishment for the original offense and does not
9 trigger the protections of the Double Jeopardy Clause. *Id.* Furthermore, under Arizona
10 law, a requirement of community supervision is simply a part of the original sentence and
11 does not violate the Double Jeopardy Clause. *State v. Jenkins*, 970 P.2d 947, 952 (Ariz.
12 Ct. App. 1998).

13 Petitioner further argues for the Court to excuse his default because he has shown
14 "actual innocence." (Doc. 13 at 7). To satisfy the standard for "actual innocence," a
15 habeas petitioner must show that because of a Constitutional error, it is more likely than
16 not that no reasonable juror would have found him guilty beyond a reasonable doubt.
17 *Schlup v. Delo*, 513 U.S. 298, 322 (1995). Neither the Supreme Court nor the Ninth
18 Circuit has extended a finding of actual innocence to apply to a sentencing issue; actual
19 innocence requires a petitioner to show he is innocent of the crime for which he is
20 incarcerated. *Gandarela v. Johnson*, 286 F.3d 1080, 1085 (9th Cir. 2001). Petitioner
21 argues that he has committed no additional crime to warrant additional criminal
22 punishment of community supervision. (Doc. 13 at 14). As stated above, however, parole
23 revocation is not an additional criminal punishment under the Double Jeopardy Clause.
24 *Moor*, 603 F.3d at 660. Additionally, Arizona law recognizes community supervision as
25 simply a part of the original sentence. *Jenkins*, 970 P.2d at 952. Petitioner has not
26 provided any evidence to prove he would have been found not guilty of the crime for
27 which he is incarcerated, and therefore is not excused of his default by "actual
28 innocence."

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III. Conclusion

For the reasons stated above,

IT IS THEREFORE ORDERED that the Report and Recommendation, (Doc. 8), is accepted. Petitioner’s objections, (Docs. 13 & 15), are overruled. The Clerk of Court shall enter judgment denying and dismissing the Petition with prejudice.

IT IS FINALLY ORDERED that pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a certificate of appealability because dismissal of the petition is based on a plain procedural bar, jurists would not find this Court’s procedural ruling debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 26th day of September, 2018.

