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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Mitchell Nelson,	)	CV 10-378 TUC DCB
Plaintiff,	)	
v.	)	
State of Arizona, et al.,	)	
Defendants.	)	<b>ORDER</b>

This matter was referred to Magistrate Judge Glenda E. Edmonds on November 22, 2010. LR Civ. 72.1(a). On April 12, 2011, Magistrate Judge Edmonds issued a Report and Recommendation. (R&R). She recommends denying the Second Amended Petition for Writ of Habeas Corpus because claims 1, 2, 3, 5 and 6 are procedurally defaulted and claim 4 is not cognizable. The Court accepts and adopts the Magistrate Judge’s R&R as the findings of fact and conclusions of law of this Court and denies the Petition.

**STANDARD OF REVIEW**

The duties of the district court in connection with a R&R by a Magistrate Judge are set forth in Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). The district court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1). Where the parties object to a Report and Recommendation, “[a] judge of the [district] court shall make a *de novo* determination of those portions of the [R&R] to which objection is made.” 28 U.S.C. § 636(b)(1); *see Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). When no objections are filed, the district court need not review the R&R *de novo*.

1 This Court's ruling is a *de novo* determination as to those portions of the R&R to which  
2 there are objections. 28 U.S.C. § 636(b)(1)(C); *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13  
3 (9th Cir.2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir.2003) (*en*  
4 *banc*). To the extent that no objection has been made, arguments to the contrary have been  
5 waived. Fed. R. Civ. P. 72; *see* 28 U.S.C. § 636(b)(1) (objections are waived if they are not  
6 filed within fourteen days of service of the Report and Recommendation), *see also* *McCall*  
7 *v. Andrus*, 628 F.2d 1185, 1187 (9<sup>th</sup> Cir. 1980) (failure to object to Magistrate's report  
8 waives right to do so on appeal); Advisory Committee Notes to Fed. R. Civ. P. 72 (citing  
9 *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9<sup>th</sup> Cir. 1974) (when no timely  
10 objection is filed, the court need only satisfy itself that there is no clear error on the face of  
11 the record in order to accept the recommendation)).

12 The parties were sent copies of the R&R and instructed that, pursuant to 28 U.S.C. §  
13 636(b)(1), they had 14 days to file written objections. *See also*, Fed. R. Civ. P. 72 (party  
14 objecting to the recommended disposition has fourteen (14) days to file specific, written  
15 objections). The Petitioner filed a Motion for Reconsideration (Doc. 17), Motion for Leave  
16 to Appeal (Doc. 18), and Motion to Hold in Abeyance (Doc. 21) for appointment of counsel.  
17 The Motion for Reconsideration contains Petitioner's objections. The Court considers the  
18 arguments made in the Motion for Reconsideration, the Second Amended Petition, and the  
19 parties' briefs considered by the Magistrate Judge, (docs. 12,13).

## 20 **REPORT AND RECOMMENDATION**

21 In the Second Amended Petition, the Petitioner claims the following: 1) he was  
22 convicted of a crime he did not commit; 2) the prosecutor elicited perjured testimony; 3) the  
23 trial judge exhibited prejudice towards the Petitioner; 4) evidence was destroyed during the  
24 pendency of the appeal; 5) his parole officer falsified the probation report, and 6) the judge  
25 read a prejudicial letter at sentencing.

1 The R&R sets out the law as it applies to claims for habeas relief made pursuant to 28  
2 U.S.C. § 2254, including the doctrines of exhaustion and procedural default. Specifically,  
3 “A claim is “procedurally defaulted” if the state court declined to address the issue on the  
4 merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9<sup>th</sup> Cir. 2002).  
5 Procedural default also occurs if the claim was not presented to the state court and it is clear  
6 the state would now refuse to address the merits of the claim for procedural reasons. *Id.* A  
7 claim that is procedurally defaulted must be denied unless the petitioner can ‘demonstrate  
8 cause for the default and actual prejudice as a result of the alleged violation of federal law,  
9 or demonstrate that failure to consider the claims will result in a fundamental miscarriage of  
10 justice.’” (R&R at 5 (quoting *Boyd v. Thompson*, 147 F.3d 1124, 1126 (9<sup>th</sup> Cir. 1998)  
11 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Claims 1, 2, 3A, 3B, 3D, 5, and  
12 6 were not presented to the state court of appeals. Consequently, they were not exhausted  
13 and cannot be brought now before the state courts because they are time barred by Ariz. R.  
14 Crim.P.32.2. *Id.* at 6.

15 Claim 3(C) that the trial court erred by allowing the investigator to testify in a way that  
16 improperly suggested the defendant was responsible for impeding her ability to locate his  
17 son was raised in the state courts, but not raised as a federal constitutional claim.  
18 Consequently, claim 3(C) was not exhausted and is procedurally defaulted. *Id.*

19 Claim 4 that the state improperly destroyed evidence prior to the resolution of his appeal  
20 is not a constitutional claim for purposes of habeas review. The Supreme Court has never  
21 held that destruction of evidence after trial violates the Constitution, therefore, there is no  
22 allegation of a violation of “clearly established Federal law, as determined by the Supreme  
23 Court.” *Id.* at 7 (citing *Cress v. Palmer*, 484 F.3d 844, 853 (6<sup>th</sup> Cir. 2007), *Ferguson v.*  
24 *Roper*, 400 F.3d 635, 638 (8<sup>th</sup> cir. 2005), *cert. denied*, 546 U.S. 1098 (2006). Additionally,  
25 Nelson cannot establish a due process violation related to the destroyed evidence. He cannot  
26 show prejudice because the appellate court did not grant him a new trial. *Id.* (citing *United*  
27 *States v. Dring*, 930 F.2d 687, 693 (9<sup>th</sup> Cir. 1991).  
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## OBJECTIONS

In his Motion for Reconsideration the Petitioner argues that his due process rights under the Constitution were violated by the destruction of evidence and it is irrelevant whether or not he was granted a new trial. He argues that the Magistrate Judge failed to address every incident where the trial court allowed evidence of other bad acts and that the totality of these evidentiary errors violated his right to a fair trial. He asks the Court to appoint counsel for him because he has not had access to the law library and is a novice in the legal field.

Plaintiff also seeks appointment of counsel because he asserts he has been unable to represent himself here and will be unable to represent himself on appeal. There is no constitutional right to the appointment of counsel in a civil case. *See, Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982); *Randall v. Wyrick*, 642 F.2d 304, 307 n. 6 (8th Cir. 1981). The appointment of counsel in a civil case is required only when exceptional circumstances are present. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). A determination with respect to exceptional circumstances requires an evaluation of the likelihood of success on the merits as well as the ability of a plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved. *Wilborn*, 789 F.2d at 1331 (9th Cir. 1986). The Plaintiff's lack of legal skill to address the merits of his claims is offset by the fact that disposition on the merits is procedurally barred, except as to claim 4 which fails to state a claim for habeas relief. Consequently both elements for assessing whether or not to appoint counsel cut against it.

## CONCLUSION

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After *de novo* review of the issues raised in Defendant's objections, this Court agrees with the findings of fact and conclusions of law made by the Magistrate Judge in her R&R for determining the pending Second Amended Petition for Writ of Habeas Corpus. The Court adopts it, and for the reasons stated in the R&R, the Court denies the Second Amended Petition.

1       **Accordingly,**

2       **IT IS ORDERED** that after a full and independent review of the record, in respect to  
3 the objections, the Magistrate Judge's Report and Recommendation (Doc. 16) is accepted  
4 and adopted as the findings of fact and conclusions of law of this Court.

5       **IT IS FURTHER ORDERED** that the Motion for Reconsideration (Doc. 17) is treated  
6 as an Objection and shall be docketed accordingly.

7       **IT IS FURTHER ORDERED** that the Motion for Appointment of Counsel (Doc. 19)  
8 is DENIED.

9       **IT IS FURTHER ORDERED** that the Second Amended Petition (Doc. 8) is DENIED.

10       **IT IS FURTHER ORDERED** the Clerk of the Court shall enter Judgment accordingly.

11       **IT IS FURTHER ORDERED** that the Motion to Appeal (Doc. 18) is DENIED.

12       **IT IS FURTHER ORDERED** that having examined the case for issuance of a  
13 Certificate of Appealability (COA), it is DENIED and leave to proceed *in forma pauperis* is  
14 DENIED because dismissal was justified by a plain procedural bar and jurists of reason  
15 would not find the procedural ruling debatable. As to claim 4, Petitioner failed to make a  
16 substantial showing of the denial of a constitutional right.  
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18       DATED this 26<sup>th</sup> day of May, 2011.

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22       David C. Bury  
23       United States District Judge  
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