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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Allen Hawkins,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

No. CV-16-00207-TUC-RCC

ORDER

15 On July 10, 2019, Magistrate Judge Bruce G. Macdonald issued a Report and
16 Recommendation (“R&R”) in which he recommended that this Court deny Petitioner
17 Michael Allen Hawkins’ Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus
18 by a Person in State Custody (Doc. 1). (Doc. 28.) Petitioner filed an objection (Doc. 28)
19 and Respondents filed a response (Doc. 31). Upon review, the Court adopts the
20 Magistrate Judge’s R&R and denies the § 2254 Habeas Petition.

21 ***I. Report and Recommendation: Standard of Review***

22 The standard the District Court uses when reviewing a magistrate judge’s R&R is
23 dependent upon whether a party objects: where there is no objection to a magistrate’s
24 factual or legal determinations, the district court need not review the decision “under a *de*
25 *novo* or any other standard.” *Thomas v. Arn*, 474 U.S. 140, 150 (1985). However, when
26 a party objects, the district court must “determine *de novo* any part of the magistrate
27 judge’s disposition that has been properly objected to. The district judge may accept,
28 reject, or modify the recommended disposition; receive further evidence; or return the

1 matter to the magistrate judge with instructions.” Fed.R.Civ.P. 72(b)(3); *see also* 28
2 U.S.C. § 636(b)(1). Moreover, “while the statute does not require the judge to review an
3 issue *de novo* if no objections are filed, it does not preclude further review by the district
4 judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard.”
5 *Thomas*, 474 U.S. at 154.

6 ***II. Factual and Procedural Background***

7 Petitioner does not dispute the R&R’s factual and procedural history, as such the
8 Court adopts the facts as stated in the R&R and will not reiterate them here.

9 ***III. Magistrate Judge’s Conclusions***

10 The Magistrate Judge organized Petitioner’s numerous arguments into six categories
11 alleging constitutional violations. The first two claims concern (1) a violation of
12 Petitioner’s speedy trial rights and (2) alleged coerced testimony. The last four assert
13 various claims of ineffective assistance of counsel.

14 a. Speedy Trial Calculation

15 First, Judge Macdonald found that Petitioner’s claim that his Federal constitutional
16 rights were violated when his trial was prolonged past that required under the speedy trial
17 provisions was not properly presented in the State court. This was because his speedy
18 trial argument was never before the state court as a Federal constitutional claim; instead
19 Petitioner asserted that it violated the Arizona state procedural rules. The Magistrate
20 Judge found the claim was technically exhausted and procedurally defaulted.

21 b. Coerced Testimony

22 Second, the judge determined that Petitioner’s claim that certain testimony was
23 coerced was expressly denied by the Arizona Court of Appeals as procedurally barred. As
24 such, the Court could not consider this claim. Furthermore, Petitioner presented his claim
25 as newly-discovered evidence, not a constitutional claim. Judge Macdonald noted that a
26 claim may only be heard in federal habeas if the state court was made aware of the
27 constitutional argument. Although Petitioner mentioned the words Due Process, they
28 were raised superficially in the context of his state claim. Moreover, he did not raise the

1 issue to the Court of Appeals, but simply told the appellate court to look at the argument
2 in his post-conviction petition. His failure to do more than mention the constitution and
3 Due Process issues meant the state courts were not granted the opportunity to fairly
4 review these claims. Like the first claim, the Magistrate Judge found this argument was
5 procedurally barred.

6 c. Ineffective Assistance of Counsel: Exculpatory Voicemails

7 In Plaintiff's first ineffective assistance of counsel claim, he alleges that trial counsel
8 was ineffective for failing to admit and elicit exculpatory voicemail evidence. The
9 Magistrate Judge decided that since Plaintiff had merely referred the state appellate court
10 to his arguments in his filing for post-conviction relief, he had not fairly presented these
11 claims to the state court, and they were technically exhausted and procedurally defaulted.

12 d. Ineffective Assistance of Counsel: Juror Misconduct, Prosecutorial
13 Misconduct,

14 The Magistrate Judge then found that Petitioner's claim that his constitutional rights
15 were violated because of juror misconduct and various instances of prosecutorial
16 misconduct were not viable because Petitioner did not present his argument directly in his
17 § 2254 habeas petition, but rather suggested that the Court peruse his state court
18 documents to find the details of his argument. The Magistrate Judge stated that the
19 District Court has no duty to discover Petitioner's arguments for him. *See Christian Legal*
20 *Soc. Chapter of Univ. of Cal. V. Wu*, 626 F.3d483, 488 (9th Cir. 2010) (citations omitted)
21 ("Judges are not like pigs, hunting for truffles buried in briefs.").

22 Moreover, at the state level, Petitioner was also not permitted to incorporate by
23 reference his lower court argument, and because he had done so his juror misconduct
24 claim was not fairly presented to the state court.

25 e. Ineffective Assistance of Counsel: Miscellaneous Claims

26 Finally, Judge Macdonald attempted to make sense of Petitioner's remaining nineteen
27 ineffective assistance of counsel claims and gave Petitioner the benefit of the doubt that
28 these were raised in his Rule 32 petition for post-conviction relief. However, Petitioner's

1 petition for review to the Arizona Court of Appeals again attempted to incorporate his
2 Rule 32 arguments by reference. So, like the other ineffective assistance of counsel
3 claims, the miscellaneous claims were also technically exhausted and procedurally
4 defaulted.

5 For each of these claims the Magistrate Judge found Petitioner had not shown cause
6 or prejudice to excuse the defaulted claims.

7 ***IV. Petitioner's Objections***

8 Petitioner's objection to the R&R does not discuss how the Magistrate Judge's
9 conclusions were incorrect. He merely asserts that his claims have some merit and he is
10 unsure what the District Court wants from him to enable the Court to proceed on the
11 merits. He claims he does not understand exhaustion, and he lacks the legal acumen to
12 present his claims sufficiently. However, the objection never challenges the fact that
13 Petitioner's state appeal incorporated by reference his prior arguments.

14 Petitioner also argues that there was cause and prejudice but provides no reason why
15 his federal claims could not have been presented to the state appellate court other than his
16 ignorance. Instead he reasserts the prejudice he believes he suffered from the various
17 alleged constitutional errors and claims these weighed to his substantial disadvantage.

18 ***V. Standard of Review***

19 For this Court to review Petitioner's habeas petition, he must demonstrate that he has
20 exhausted his state remedies by "fairly presenting" the same issues to the state's highest
21 court. 28 U.S.C. § 2254(b)(1)(A); *see also Coleman v. Thompson*, 501 U.S. 722, 731
22 (1991). To "fairly present" an issue, petitioner must "describe[] the operative facts and
23 legal theory upon which his claim is based." *Duncan v. Henry*, 513 U.S. 364, 370 n.1
24 (1995) (quoting *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986).

25 Furthermore, Petitioner must illustrate the factual and legal basis for his federal
26 claims within the § 2254 habeas petition, and the District Court is not obliged "to review
27 the entire state record of habeas corpus petitioners to ascertain whether facts exist which
28 support habeas relief." *Adams v. Armontrout*, 897 F.2d 332, 333–34 (8th Cir. 1990); *see*

1 *also Williams v. Kullman*, 722 F.2d 1048, 1051 (2nd Cir. 1983) (“despite our firm
2 conviction that the pleading requirements in habeas corpus proceedings should not be
3 overly technical and stringent, it would be unwise to saddle district judges with the
4 burden of reading through voluminous records and transcripts in every case”); *Moore v.*
5 *Swenson*, 361 F. Supp. 1346, 1351 (E.D. Mo. 1973) (“Petitioner must set out his grounds
6 specifically without reference to another lengthy document.”); *but see Regains v. Robert*,
7 No. 11 C 5445, 2012 WL 2513935, at *6 (N.D. Ill. June 27, 2012) (allowing review of
8 habeas claim but denying relief when petitioner specifically requested the court
9 incorporate arguments from the state appeal).

10 In addition, even when raised in the state supreme court, “incorporation by reference”
11 does not exhaust a constitutional claim. *See Baldwin v. Reese*, 541 U.S. 27, 30-31 (2004);
12 *Wood v. Ryan*, 693 F.3d 1104, 1117 (9th Cir. 2012) (Arizona Rule of Criminal Procedure
13 32.9(c)(1)(iv) prohibits the appeal of an issue if “the issues and material facts supporting
14 a claim” are merely incorporated by reference).

15 Furthermore, “it is well established that ‘ignorance of the law, even for an
16 incarcerated *pro se* petitioner” is no excuse for failing to follow procedural rules. *Marsh*
17 *v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (quoting *Fisher v. Johnson*, 174 F.3d
18 710, 714 (9th Cir. 1999)); *see also In re Marriage of Williams*, 200 P.3d 1043, 1046
19 (Ariz. Ct. App. 2008).

20 **VI. Discussion**

21 Petitioner needed to present reasons why he failed to raise the federal issue at the state
22 court appellate level to demonstrate cause for his failure to present his claims to the
23 highest state court. He has made no such showing. In addition, he acknowledges he
24 incorporated his arguments by reference, but claims he simply does not know how to
25 present these claims effectively.

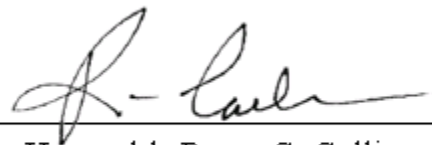
26 The Court finds that Petitioner has not demonstrated that the state court determination
27 was contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d);
28 *see also Cullen v. Pinholster*, 563 U.S. 170 (2011). Neither does his objection raise any

1 viable argument that the Magistrate Judge’s determinations were legally incorrect.
2 Petitioner was required to raise the factual basis for his constitutional claims at the state
3 level prior to bringing them in habeas. *See Baldwin*, 541 U.S. at 33 (2004); *see also*
4 *Hivala v. Wood*, 195 F.3d 1098 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000). The
5 Court finds Magistrate Judge Macdonald’s conclusions well-reasoned and adopts them.

6 Upon *de novo* review, IT IS ORDERED:

- 7 1. Magistrate Judge Macdonald’s Report and Recommendation is ADOPTED. (Doc.
8 28.)
- 9 2. Michael Allen Hawkins’ Petition Under 28 U.S.C. § 2254 for a Writ of Habeas
10 Corpus by a Person in State Custody is DENIED. (Doc. 1.)
- 11 3. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event
12 Petitioner files an appeal, the Court declines to issue a certificate of appealability
13 because reasonable persons could not “debate whether (or, for that matter, agree
14 that) the petition should have been resolved in a different manner or that the issues
15 presented were adequate to deserve encouragement to proceed further.” *See Slack*
16 *v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted).
- 17 4. The Clerk of Court shall docket accordingly and close the case file in this matter.

18 Dated this 4th day of September, 2019.

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23 Honorable Raner C. Collins
24 Senior United States District Judge
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