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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Donnie Ray Matthews,

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No. CV 17-310-TUC-CKJ (LAB)

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Petitioner,

)

**REPORT AND RECOMMENDATION**

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vs.

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Charles Ryan; et al.,

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Respondents.

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Pending before the court is an amended petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, filed on July 24, 2017, by Donnie Ray Matthews, an inmate confined in the Arizona State Prison Complex in Florence, Arizona. (Doc. 4)

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Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Bowman for report and recommendation.

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The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order denying the petition. Matthews' claims are procedurally defaulted.

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Summary of the Case

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Matthews was convicted after a jury trial of two counts of third-degree burglary. (Doc. 17, p. 4) On August 19, 2013, the trial court sentenced him to concurrent eight-year terms of imprisonment. *Id.*; (Doc. 17-4, pp. 2-5) Matthews filed a Motion to Vacate Judgment on

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1 August 24, 2013. (Doc. 18, pp. 3-28) The trial court denied the motion on September 30, 2013.  
2 (Doc. 18, pp. 34-36)

3 On direct appeal, Matthews argued (1) he was deprived of due process when his motion  
4 for change of judge was ignored, (2) the delay in ruling on that motion caused him prejudice and  
5 denied him his Sixth Amendment right to self-representation, and (3) the trial court abused its  
6 discretion by denying his motion to vacate the judgment. (Doc. 17, pp. 3-12) The Arizona  
7 Court of Appeals affirmed his convictions and sentences on October 21, 2014. *Id.* Matthews  
8 did not file a petition for review with the Arizona Supreme Court. (Doc. 21, p. 34)

9 Previously on September 24, 2013, Matthews filed notice of post-conviction relief  
10 (PCR). (Doc. 19-6), p. 2) The trial court stayed the PCR proceedings until after the direct  
11 appeal. (Doc. 19-9, p. 2); (Doc. 19-10, p. 2) The court appointed advisory counsel and  
12 restarted PCR proceedings on January 30, 2015. (Doc. 19-10, p. 2)

13 On February 12, 2015, Matthews filed in the trial court a pro se Petition for Writ of  
14 Habeas Corpus. (Doc. 20, pp. 1-55); (Doc. 21, pp. 2-26) He argued (1) the state failed to  
15 properly institute charges by filing a complaint and proving probable cause to the magistrate in  
16 regards to the burglary of Ghinis French Cafe, (2) per se prejudice affected the trial, (3)  
17 prosecutorial misconduct denied him a fair trial, and (4) trial counsel was ineffective for making  
18 him accept “unfounded stipulations” regarding prior convictions. (Doc. 22, pp. 6-8) The trial  
19 court treated the habeas petition as a Rule 32 PCR petition. (Doc. 21, p. 37) On July 10, 2015,  
20 the trial court denied the petition because the first three claims were precluded pursuant to  
21 Ariz.R.Crim.P. 32.2(a) and the fourth was without merit. (Doc. 22, pp. 6-9) Matthews did not  
22 file a petition for review with the Arizona Court of Appeals. (Doc. 4, p. 5)

23 On February 3, 2016, Matthews filed in the trial court a second Petition for Writ of  
24 Habeas Corpus. (Doc. 22, pp. 13-40) He argued again that he could not be convicted of  
25 burglary of the Ghinis French Cafe because the original complaint did not contain that charge.  
26 *Id.* The trial court construed the petition as a supplemental Rule 32 PCR petition and, on  
27 February 26, 2016, denied all claims as precluded pursuant to Ariz.R.Crim.P. 32.2(a). (Doc.  
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1 23, pp. 6-7) Matthews did not file a petition for review with the Arizona Court of Appeals.  
2 (Doc. 4, p. 5)

3 On August 30, 2016, Matthews filed in the trial court a third Petition for Writ of Habeas  
4 Corpus. (Doc. 23, pp. 9-22) He argued again that he could not be convicted of the Ghinis  
5 French Cafe burglary because the magistrate did not issue an arrest warrant for that charge. *Id.*  
6 On September 19, 2016, the trial court construed the petition as a supplemental Rule 32 PCR  
7 petition and denied all claims as precluded pursuant to Ariz.R.Crim.P. 32.2(a). (Doc. 23, pp.  
8 26-27) On January 10, 2017, the Arizona Court of Appeals granted review but denied relief.  
9 (Doc. 24, pp. 24-26) The court found that Matthews’s PCR proceeding was “untimely.” (Doc.  
10 24, p. 26)

11 On July 5, 2017, Matthews filed in this court a Petition for Writ of Habeas Corpus  
12 pursuant to 28 U.S.C. § 2254. (Doc. 1) He filed an amended petition on July 24, 2017. (Doc.  
13 4) Matthews argues (1) he is falsely imprisoned because “the state unlawfully indicted, tried,  
14 and convicted the petitioner,” (2) the state lacked “subject matter jurisdiction to indict, try, and  
15 convict the petitioner,” (3) he was convicted of a crime different from the one contained in the  
16 complaint, and (4) the state committed structural error by employing a twelve-person grand  
17 jury. (Doc. 4)

18 In their answer, the respondents argue, among other things, that Matthews’ claims are  
19 procedurally defaulted. (Doc. 16) They are correct. The court does not reach the respondents’  
20 alternative arguments.

21 Matthews filed a reply on April 23, 2018. (Doc. 27) He describes the circumstances  
22 leading to his arrest and argues that his Fourth Amendment rights were violated. *Id.* He further  
23 argues that the court that convicted him was without “subject matter jurisdiction.” *Id.* He does  
24 not address the issue of procedural default. *Id.* It appears that Matthews is attempting to raise  
25 new grounds for relief in his reply; that is not allowed. The new grounds will not be considered.  
26 *See Ward v. People of the State of California*, 2016 WL 5133917, at \*5, n. 4 (C.D. Cal. 2016),  
27 report and recommendation adopted, 2016 WL 5030352 (C.D. Cal. 2016).

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1            Discussion

2            The writ of habeas corpus affords relief to persons in custody in violation of the  
3 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is  
4 in custody pursuant to the judgment of a state court, the writ will not be granted unless prior  
5 adjudication of the claim –

6            (1) resulted in a decision that was contrary to, or involved an unreasonable  
7 application of, clearly established Federal law, as determined by the Supreme  
8 Court of the United States; or

8            (2) resulted in a decision that was based on an unreasonable determination of the  
9 facts in light of the evidence presented in the State court proceeding.

9            28 U.S.C. § 2254(d).

10           Federal habeas review is limited to those issues that have been fully presented to the state  
11 courts. This so-called “exhaustion rule” reads in pertinent part as follows:

12           An application for a writ of habeas corpus on behalf of a person in custody  
13 pursuant to the judgment of a State court shall not be granted unless it appears  
14 that – (A) the applicant has exhausted the remedies available in the courts of the  
15 State. . . .

15           28 U.S.C. § 2254(b)(1)(A).

16           To be properly exhausted, a claim must be “fairly presented” to the state courts. *Picard*  
17 *v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971). In other words, the state courts must  
18 be apprised of the issue and given the first opportunity to rule on the merits. *Id.* at 275-76.  
19 Accordingly, the petitioner must “present the state courts with the same claim he urges upon the  
20 federal courts.” *Id.* “The state courts have been given a sufficient opportunity to hear an issue  
21 when the petitioner has presented the state court with the issue’s factual and legal basis.”  
22 *Weaver v. Thompson*, 197 F.3d 359, 364 (9<sup>th</sup> Cir. 1999).

23           In addition, the petitioner must explicitly alert the state court that he is raising a federal  
24 constitutional claim. *Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887, 888 (1995); *Casey*  
25 *v. Moore*, 386 F.3d 896, 910-11 (9<sup>th</sup> Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005). The  
26 petitioner must make the federal basis of the claim explicit either by citing specific provisions  
27 of federal law or federal case law, even if the federal basis of a claim is “self-evident,” *Gatlin*  
28 *v. Madding*, 189 F.3d 882, 888 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000), or by citing

1 state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*,  
2 319 F.3d 1153, 1158 (9<sup>th</sup> Cir. 2003) (en banc).

3 If the petitioner is in custody pursuant to a judgment imposed by the State of Arizona,  
4 he must present his claims to the Arizona Court of Appeals for review. *Castillo v. McFadden*,  
5 399 F.3d 993, 998 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 818 (2005); *Swoopes v. Sublett*, 196  
6 F.3d 1008 (9<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000). If state remedies have not been  
7 properly exhausted, the petition may not be granted and ordinarily should be dismissed without  
8 prejudice. *See Johnson v. Lewis*, 929 F.2d 460, 463 (9<sup>th</sup> Cir. 1991). In the alternative, the court  
9 has the authority to deny on the merits rather than dismiss for failure to properly exhaust. 28  
10 U.S.C. § 2254(b)(2).

11 A claim is “procedurally defaulted” if the state court declined to address the claim on the  
12 merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9<sup>th</sup> Cir. 2002).  
13 Procedural default also occurs if the claim was not presented to the state courts and it is clear  
14 the state would now refuse to address the merits of the claim for procedural reasons. *Id.*

15 Procedural default may be excused if the petitioner can “demonstrate cause for the  
16 default and actual prejudice as a result of the alleged violation of federal law, or demonstrate  
17 that failure to consider the claims will result in a fundamental miscarriage of justice.” *Boyd v.*  
18 *Thompson*, 147 F.3d 1124, 1126 (9<sup>th</sup> Cir. 1998). “To qualify for the fundamental miscarriage  
19 of justice exception to the procedural default rule, however, [the petitioner] must show that a  
20 constitutional violation has probably resulted in the conviction when he was actually innocent  
21 of the offense.” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9<sup>th</sup> Cir. 2008).

22 If a claim is procedurally defaulted and is not excused, the claim will be dismissed with  
23 prejudice because the claim was not properly exhausted and “the petitioner has no further  
24 recourse in state court.” *Franklin*, 290 F.3d at 1231.

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26 Claim (1)

27 In Claim (1) Matthews argues he is falsely imprisoned because “the state unlawfully  
28 indicted, tried, and convicted the petitioner” violating U.S. Constitutional Amendments 4, 5, 6,

1 and 14 and Arizona Constitutional Amendments 4, 5, 6, and 14. (Doc. 1, p. 6) The gravamen  
2 of the claim is not entirely clear. It appears that Matthews is aggrieved by the fact that he was  
3 initially arrested for burglary of Rainbow Jewelers but the grand jury indicted him for both the  
4 Rainbow Jewelers burglary and the Ghinis French Cafe burglary. But whatever the nature of  
5 the claim, it is procedurally defaulted.

6 Matthews asserts that this claim was presented in his third state habeas petition, which  
7 was denied by the trial court on September 19, 2016 and reviewed by the Arizona Court of  
8 Appeals. (Doc. 4, pp. 5-6) The court assumes for the purposes of this petition that Matthews  
9 is correct and the claim was presented there. The third petition, however, was ruled  
10 procedurally precluded by the Arizona Court of Appeals pursuant to Ariz.R.Crim.P. 32.2(a).  
11 (Doc. 24, pp. 24-26) Claim (1) is therefore procedurally defaulted. *See Franklin v. Johnson*,  
12 290 F.3d 1223, 1230 (9<sup>th</sup> Cir. 2002). In his reply brief, Matthews does not advance any reasons  
13 why this default should be excused. *See Boyd v. Thompson*, 147 F.3d 1124, 1126 (9<sup>th</sup> Cir.  
14 1998).

15 The court finds in the alternative that to the extent Matthews is complaining about the  
16 grand jury procedures, his claim is not cognizable. The Fifth Amendment right to indictment  
17 by grand jury does not bind the states because it was not incorporated by the Fourteenth  
18 Amendment due process clause. *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S. Ct. 1221,  
19 1226-27 (1972). Irregularities in the indictment procedure might be a violation of state law,  
20 but they are not a violation of *federal* law. And the writ of habeas corpus lies only for errors  
21 of federal law. 28 U.S.C. § 2254(a).

22 To the extent Matthews is complaining that he was held for trial without a probable cause  
23 determination by the magistrate, his claim is meritless. *See* 28 U.S.C. §2254(b)(2). “It is well  
24 settled that illegal arrest or detention of a suspect does not void a subsequent conviction.”  
25 *Myers v. Rhay*, 577 F.2d 504, 507 (9<sup>th</sup> Cir. 1978) (*citing Gerstein v. Pugh*, 420 U.S. 103, 119,  
26 95 S. Ct. 854, 865 (1975)).

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1           Claims (2), (3), and (4)

2           In Claim (2), Matthews argues “[t]he State had no subject-matter jurisdiction to indict,  
3 try, and convict the petitioner, Donnie Ray Matthews, [for] 3<sup>rd</sup> degree burglary of [the] Ghinis  
4 [F]rench [C]afe” because he was originally arrested only for the Rainbow Jewelers burglary.  
5 (Doc. 4, p. 7) In Claim (3), Matthews argues the State lacked subject matter jurisdiction  
6 because he was convicted of the Ghinis [F]rench [C]afe burglary but that crime was not named  
7 in the original complaint. (Doc. 4, p. 8) And in Claim (4), Matthews argues he was improperly  
8 tried to a “twelve (12) person state grand jury” but because of the sentence he faced, he “was  
9 entitled to a nine (9) person state grand jury.” (Doc. 4, p. 9)

10           Matthews argues that these claims were raised in his first and second state habeas  
11 petitions. (Doc. 4, pp. 7-9) The court assumes for the purposes of this petition that Matthews  
12 is correct and the claims were presented there. These petitions were denied by the trial court,  
13 but Matthews never petitioned the Arizona Court of Appeals for review. Accordingly, these  
14 claims were not properly exhausted. Moreover, Matthews cannot return to state court and  
15 properly exhaust them now because his petition for review would be untimely pursuant to  
16 Ariz.R.Civ.P. 32.9 and his issues are precluded pursuant to Ariz.R.Civ.P. 32.2(a). Claims (2),  
17 (3), and (4) are therefore procedurally defaulted. *See Franklin v. Johnson*, 290 F.3d 1223, 1230  
18 (9<sup>th</sup> Cir. 2002).

19           In his reply brief, Matthews does not advance any reasons why these defaults should be  
20 excused. *See Boyd v. Thompson*, 147 F.3d 1124, 1126 (9<sup>th</sup> Cir. 1998). In the amended petition  
21 Matthews states that he did not present Claim (2) to the Arizona Court of Appeals because  
22 “action by the state court constitute extreme prejudice by the state unlawful convictions is not  
23 compromised by hindering, impeding and obstructing submission to the court of exculpatory  
24 evidence by refusing to properly address petitioner’s claims.” (Doc. 4, p. 7) He states he did  
25 not appeal Claim (3) because “action by the state constitute extreme prejudice by the state  
26 unlawful conviction and sentence is not compromised by hindering, impeding and obstructing  
27 discovery and/or submission to the court exculpatory evidence and/or evidence in which would  
28 impeach police, prosecutors and/or witnesses by denying the right to any redress of petitioner’s


1 claims.” (Doc. 4, p. 8) He states he did not appeal Claim (4) because “the actions by the state  
2 constitute extreme prejudice by the state unlawful conviction and sentences is not compromised  
3 by hindering, impeding and obstructing discovery and/or submission to the court of exculpatory  
4 evidence and/or evidence which would impeach police, prosecutors and/or witnesses, denying  
5 petition the right to any redress of his claims.” (Doc. 4, p. 9) The court is unable to understand  
6 Matthews’ arguments. Consequently, the court finds that Matthews has not established cause  
7 and prejudice sufficient to excuse his procedural defaults. *See Boyd v. Thompson*, 147 F.3d  
8 1124, 1126 (9<sup>th</sup> Cir. 1998).

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10 RECOMMENDATION

11 The Magistrate Judge recommends that the District Court, after its independent review  
12 of the record, enter an order DENYING the Petition for Writ of Habeas Corpus. (Doc. 1) All  
13 of the petitioner’s claims are procedurally defaulted.

14 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within  
15 14 days of being served with a copy of this report and recommendation. If objections are not  
16 timely filed, they may be deemed waived. The Local Rules permit a response to an objection.  
17 Reply briefs are not permitted absent permission from the District Court.

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19 DATED this 15<sup>th</sup> day of June, 2018.

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23 Leslie A. Bowman  
24 United States Magistrate Judge  
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